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ABSTRACT

The materials in this compendium are intended to assist counsel and administrators at institutions of higher education faced with the need to consider and plan for program closures. Some materials also deal with the closely related issues of financial exigency, faculty reductions, and reductions in force. Section I offers the following papers: "The Age of Austerity: Downsizing for the 90's" (Corinne A. Houpt); "Problems of Contraction: Legal Considerations in University Retrenchment" (Annette B. Johnson); "Evaluating and Discontinuing Programs" (Edward A. Dougherty); "Planning the Unthinkable: Issues in Institutional Reorganization and Faculty Reductions" (Steven Glenn Olswang); "Procedures and Criteria for Faculty Retrenchment" (Kenneth P. Mortimer); "What If the Faculty Member To Be Laid Off Is the Governor's Brother?" (Colleen Dolan-Greene); "Terminations without Tears: Avoiding Litigation Risks in Reductions in Force" (Peter M. Panken and Michael Starr); "Planning for Workforce Reductions: Charting a Course around the Legal Icebergs" (Fred W. Alvarez and Elena E. Matsis); "Program Elimination, Financial Emergency, and Student Rights" (Steven Glenn Olswang and others); "To Save a College: Independent College Trustees and Decisions on Financial Exigency, Endowment Use and Closure" (Edward A. Johnson and Kent M. Weeks); and "Closing a College: Trustee Decisions and Administrative Policies" (Joseph P. O'Neill and Samuel Barnett). Section II consists of various guidelines and institutional policies and procedures on terminations or reductions of programs, terminations of faculty and staff, and treatment of students affected by program closures. Section III includes internal documents and agreements from specific program closure situations. A resource list of 19 monographs and journal articles concludes the compendium. (JDD)

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**ACADEMIC PROGRAM CLOSURES:
A LEGAL COMPENDIUM**

Edited by
Corinne A. Houpt

National Association of College
and University Attorneys

1991

Corinne Anderson Houpt is General Counsel for Mercer University and Of Counsel to the Atlanta-based labor and employment law firm of Fisher & Phillips. She previously served as Vice President and in-house General Counsel for Mercer, and before that, as Associate Counsel for Duke University. Ms. Houpt received her B.A. from Wheaton College and her J.D. from the University of California, Berkeley (Boalt Hall). She has been a member of the NACUA Board of Directors, has served on numerous committees, and has been a speaker at NACUA conferences.

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EDITOR'S INTRODUCTION

Perhaps the greatest challenge facing colleges and universities in this decade is adjusting their activities to meet reduced financial resources. According to Robert Atwell, president of the American Council on Education, at least three-quarters of the nation's public institutions and virtually all private ones are experiencing tighter budgets and the prospect of cutting back on academic programs (Chronicle of Higher Education, January 30, 1991). Increasingly, colleges and universities are running out of more palatable belt-tightening options and are facing the need to make deep cuts, including program eliminations and closures of entire schools.

The materials in this compendium are intended to assist counsel and administrators faced with the need to consider and plan for program closures. Some of the materials also deal with the closely-related issues of financial exigency, faculty reductions, and reductions in force, since financial considerations so often play a dominant role in the decision to close a program, and since reductions of programs and staff instead of (or in addition to) total closures may be the institutional response when resources are insufficient to support all programs. While there is some repetition in the materials, the differences in the authors' perspectives and the variety of examples from actual institutional experience were thought to justify erring on the side of overinclusiveness.

Section I begins with two general pieces identifying some of the major legal issues unique to colleges and universities involved in program closures and reductions. It continues with articles, chapters and outlines from both legal and educational literature, focusing more narrowly on various issues and problems in closures and reductions, from various perspectives. Two outlines discuss legal considerations applicable to employers generally in workforce reduction and closings. While most of the materials deal with closures or reductions within an ongoing institution, the last two articles address entire college closings. An effort has been made to provide a balance between materials addressing the law and those discussing institutional planning, decision-making and consequences.

Section II consists of various guidelines and institutional policies and procedures on terminations or reductions of programs, terminations of faculty and staff, and treatment of students affected by program closures.

Section III includes internal documents and agreements from specific program closure situations.

We hope that the information and resources in this compendium will help those faced with the hard choices involved when program closures must be considered.

Corinne A. Houpt
Fisher & Phillips
Atlanta, Georgia

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THE AGE OF AUSTERITY: DOWNSIZING FOR THE 90'S

June 19-22, 1991

Corinne A. Houpt
Mercer University
Macon and Atlanta, Georgia

I. INTRODUCTION

A. Many observers predict that the 1990's will be a decade of unprecedented austerity for higher education. Increasingly, colleges and universities are running out of more palatable belt-tightening options and are facing the need to make deep cuts, including program eliminations and closures of entire schools.

B. Closing an academic program, whether an entire college or school or a smaller institutional unit, is difficult and painful. The reasons for the closure decision, the process by which it is made, and the manner in which it is carried out are all ripe areas for conflict and challenge. The most likely litigants are those most directly affected by the closure: faculty members whose positions are eliminated and students whose educational and career plans may be disrupted. But challenges may also come from other quarters: trustees who disagree with the decision, donors, alumni, public and community interests.

C. This outline addresses three areas with legal implications in program closure situations: faculty rights; student rights; and issues concerning restricted funds. The discussion is limited to program closures within an ongoing institution. For total institutional closures, see J. O'Neil and S. Barnett, Colleges and Corporate Change: Merger, Bankruptcy, and Closure (Conference-University Press 1980).

II. FACULTY RIGHTS

A. Sources of Faculty Rights

1. The primary source of faculty rights, at both public and private institutions, is contract law.

a. The scope and terms of faculty contracts may be difficult to ascertain and may vary widely, even among faculty members at the same institution. They may include express written provisions (often limited to a brief appointment letter); other documents expressly or impliedly incorporated by reference (bylaws,

board policies, faculty handbook, perhaps policies of the American Association of University Professors [AAUP]); and academic custom and practice, within the institution and in the national academic community (may be looked to for interpretation or to fill in gaps).

b. "Financial exigency" and "discontinuance of a program or department of instruction" have long been recognized as valid grounds for terminating faculty appointments, including those with tenure. Most institutions' policies include express provisions (variously worded) permitting termination on these bases. Even without express provisions, courts have looked to academic custom and practice to determine that the tenure contract impliedly permits such terminations. Krotkoff v. Goucher College, 585 F. 2d 655 (4th cir. 1978) (financial exigency); Jiminez v. Almodovar, 650 F. 2d 363 (1st Cir. 1981) (change in academic program).

2. Faculty in public institutions may also assert constitutional due process rights.

a. The tenure contract provides the requisite property interest. Johnson v. Board of Regents, 377 F. Supp. 227 (W.D. Wis. 1974), aff'd 510 F.2d 975 (7th Cir. 1975); Board of Regents v. Roth, 408 U.S. 564 (1972).

b. In Johnson, supra, the Court determined that due process required the following minimum procedures in a financial exigency layoff of tenured faculty: a reasonably adequate description of the manner in which the initial decision had been reached; a reasonably adequate disclosure to each plaintiff of the information and data on which the decision-makers had relied; and providing each plaintiff the opportunity to respond.

c. In Jiminez, supra, the Court held that the procedures followed, though less strict than those in terminations for cause, afforded procedural due process where the termination was because of a program change.

3. Federal and State laws applicable to employment actions generally (e.g. laws prohibiting discrimination, plant closing laws, etc.) are not addressed in this outline.

B. Faculty Rights According to the AAUP

1. AAUP standards may be expressly or impliedly incorporated in an institution's faculty employment

contracts, or they may be looked to as evidence of custom and practice in the academic community.

a. The 1940 "Statement of Principles on Academic Freedom and Tenure" (which recognizes that tenured appointments may be terminated as a result of program discontinuance or financial exigency) has achieved wide acceptance as "the national academic community's understanding of the concept of tenure." See Krotkoff, supra.

b. The definitions and detailed provisions concerning such terminations in the "Recommended Institutional Regulations on Academic Freedom and Tenure" (RIR) have not received the same acceptance.

2. The RIR draws a clear line of demarcation between program closures mandated by financial exigency and other program closures.

a. Discontinuance of a program or department not mandated by financial exigency (Regulation 4(d))

i. Decision must be based essentially on educational considerations, as determined primarily by the faculty ("educational considerations" cannot include cyclical or temporary variations in enrollment).

ii. Institution must make every effort to place affected faculty members in other suitable positions. Institution should plan to bear costs of retraining, relocating or otherwise compensating affected faculty members.

iii. Faculty members may appeal proposed termination or relocation, with right to full hearing before faculty committee. In such a hearing, a faculty determination to discontinue a program is presumptively valid, but burden of proof on other issues is on administration.

b. Financial exigency standards (Regulation 4(c)) apply when discontinuance of program is mandated by financial exigency of the institution.

i. Financial exigency is defined as "an imminent financial crisis which threatens the survival of the institution as a whole and which cannot be alleviated by less drastic means."

ii. A faculty body should participate in decision that financial exigency exists or is imminent, and that all feasible alternatives have been pursued.

iii. The faculty or appropriate faculty body should be primarily responsible for determining where within the academic program terminations should occur, and for determining criteria for identifying individuals to be terminated.

iv. An individual or group approved by the faculty should identify individuals whose appointments are to be terminated.

v. Affected faculty members must have right to full hearing before faculty committee. Issues may include existence and extent of financial exigency (burden of proof on administration), validity of criteria for identification (recommendations of faculty body presumptively valid), and whether criteria were properly applied.

vi. Institution must not make new appointments or terminate tenured over nontenured faculty except in extraordinary circumstances where serious distortion in academic program would otherwise result.

vii. Before termination, institution must make every effort to place faculty member in a suitable position within the institution.

viii. Affected faculty members must be given notice or severance salary not less than as prescribed in Regulation 8 (at least one year for tenured faculty).

3. General approach of AAUP recommendations includes faculty involvement in initial decision, efforts to find another suitable position for the faculty member within the institution, advance notice or severance salary, and right to a hearing before a faculty committee.

4. Most colleges and universities endorse the general AAUP approach but find adherence to some of the specifics, in particular the "survival standard" for financial exigency, not only unworkable but irresponsible.

C. AAUP Standards and Case Law

1. Reported cases dealing with faculty terminations because of financial exigency or program closure appear to reflect the understandings and realities

of the academic community more accurately than the current AAUP guidelines.

a. Specific contract provisions at variance with AAUP's standards will be upheld. See, e.g. Rose v. Elmhurst College, 379 N.E. 2d 791 (Ill. App. 1978) (provision in Faculty Manual permitted termination if position discontinued because of decline in enrollment or lack of funds).

b. Where institution's policies include no express provision, courts have looked to custom and practice, as evidenced by the 1940 Statement of Principles on Academic Freedom and Tenure, to determine that the contract permitted termination of tenured faculty because of financial exigency (Krotkoff, supra) or change in academic program (Jiminez, supra). But they have not accepted the details of the Recommended Institutional Regulations, absent specific incorporation.

i. AAUP's "survival standard" has not received judicial approval. Several courts have agreed that the existence of financial exigency should be determined by the adequacy of a college's operating funds, without requiring sale of capital assets or invasion of endowment. AAUP v. Bloomfield College, 346 A. 2d 615 (1975); Krotkoff, supra.

ii. One court specifically declined to accept an institution-wide definition of financial exigency, noting:

To accept plaintiff's definition would require Creighton to continue programs running up large deficits so long as the institution as a whole had financial resources available to it. The inevitable result of this type of operation would be to spread the financial exigency in one school or department to the entire university ... The rapidly changing needs of students and society demand that university administrators have sufficient discretion to retrench in areas faced with financial problems.

Scheuer v. Creighton University, 260 N.W. 2d 595 (1977). (Creighton's Handbook specifically incorporated the 1940 Statement of Principles and 1958 Statement of Procedural Standards; AAUP's institution-wide definition first appeared in 1976 Recommended Institutional Regulations.)

iii. In Jiminez, supra., the institutional action was a program reduction, not a formal elimination; the RIR make no specific reference to faculty terminations because of program reductions.

iv. The reasons for the program change in Jiminez were low enrollment, a recent evaluation of the program, and the recommendations of the director of the department and of the college. It is not clear whether these would constitute "educational considerations" or whether the determination was made primarily by the faculty, as the RIR provides.

c. AAUP's general approach, requiring that the decision be demonstrably bona fide, that fair procedures be followed in identifying which faculty members will be dismissed, and that the institution make reasonable efforts to provide suitable alternative employment at the institution, has been accepted. See Krotkoff, supra; Browzin v. Catholic University, 527 F.2d 843 (D.C. Cir. 1975); Bloomfield College, supra.

d. Probably the most frequently challenged aspect of faculty dismissals in financial exigency or program discontinuance cases, and the one most amorphous and difficult to deal with, is whether the dismissals are demonstrably bona fide.

i. In Bloomfield, the appellate court upheld the trial court's finding that the faculty dismissals were not bona fide, despite the existence of a genuine financial exigency:

The existence of the "financial exigency" per se does not necessarily mean that the termination of tenure was proper. The key factual issue before the court was whether the financial exigency was the bona fide cause for the decision to terminate the services of thirteen members of the faculty and to eliminate the tenure of the remaining members of the faculty... Causation and motivation therefore emerged as the prime factual issue for determination by the trial judge. (Bloomfield, supra at 617-618)

ii. In a recent case arising out of the closure of Mercer University's College of Arts and Sciences in Atlanta, the faculty plaintiffs contended, among other things, that the closure decision was not bona fide because the faculty had not directly participated in making the decision. The faculty contracts did not require faculty involvement in decisions to close entire schools

(in contrast to departments, or other units within schools) and the University had previously closed two other schools without direct faculty involvement; but the plaintiffs contended that the term "bona fide discontinuance of a program," as used in the faculty handbook, had acquired a special meaning in the academic community which included a requirement of faculty involvement in the closure decision.

iii. The relationship of the meaning of "bona fide" in the context of faculty contract rights and the definition of "bad faith" under state statutes entitling litigants to recover attorneys fees also became an issue in the Mercer case.

D. Planning Considerations (and Lessons from the Trenches)

1. Review existing faculty contracts (and all institutional documents which are or might be considered part of the contract) to determine what they say about termination in the event of both financial exigency and program discontinuance.

2. Consider especially whether the institution has already adopted AAUP policy and, if so, to what extent.

3. Become fully familiar with the AAUP position, whether or not you conclude that it has or may have any role in determining or interpreting the terms of the institution's faculty employment contracts.

4. Become as knowledgeable as possible about the contemplated institutional decision and the reasons for it. If the circumstances warrant and the faculty contracts permit proceeding on either a financial exigency or program discontinuance rationale, carefully consider which makes more sense. The decision will involve significant policy considerations far beyond the ease or difficulty of defending the position in court. Remember that "law is just one fact in a policy decision" (an overall rule of thumb learned from A. Kenneth Pye, President of SMU).

5. If the contract provisions appear not to reflect the institution's desired position, consider whether it makes sense to attempt to amend or clarify the contracts to cure the problems (or whether attempting a cure in the midst of program closure planning may be worse than the disease).

6. If possible, involve an appropriate faculty committee in all decision-making that involves educational policy and in setting criteria for identifying faculty

members to be terminated, whether or not your faculty contracts require such involvement.

7. Assign to an individual or group with an impeccable reputation for fairness the task of identifying faculty members to be terminated.

8. Follow your own rules religiously, and whether or not your contracts require, stay as close to the AAUP procedural requirements as possible. In particular, provide notice to affected faculty members as soon as possible.

9. Be prepared for the possibility that internal review procedures will not be trusted (where the Board has already made the closure decision) and will be viewed as useless procedural minuetts. Consider using an external mediator or other alternative dispute resolution mechanism.

10. Be as candid with faculty members as possible. Emotions run very high in a program closure situation, and suspicions and rumors are invariably more damaging than the truth.

11. Never underestimate the human trauma that the closure of a program (especially a school) can cause. The loss to affected faculty members is often not only of their jobs but also their community of colleagues and their sense of identity.

12. Place a high priority on assisting faculty in finding new employment, whether within the institution or elsewhere, and otherwise preparing for the future. Expect anger and bitterness and resistance to such efforts, but keep trying. Appoint the wisest, most genuinely compassionate, and most patient individuals available to deal with faculty during the transition period.

13. Do not be surprised if a lawsuit results despite careful planning and implementation. Many lawsuits challenging program closures are primarily or exclusively motivated by an intense desire to stop the closure and keep the program open. In our experience, only after the court denied injunctive relief were the affected faculty members able to focus on their individual options for the future.

14. Stay on the high road in any litigation.

III. STUDENT RIGHTS

A. Sources of Student Rights

1. It is reasonably well settled that the relationship between a college or university and its students is contractual. The contract is generally described as implied, with specific terms to be found in the university bulletin or catalog and other publications, as well as by custom and usage. See, e.g. Peretti v. Montana, 464 F. Supp. 784 (D. Mont. 1979), rev'd on jurisdictional grounds, 661 F. 2d 756 (9th Cir. 1981).

2. While applying contract theory to analyze the rights and obligations of students and institutions in various contexts, the courts have also stressed that "an educational institution, which is a living changing thing, may not reasonably be expected to remain static" (Peretti, supra); that the specific nature of the contract may well vary with the specific situation presented (Behrend v. State, 379 N.E. 2d 617); and that contract law should not be rigidly applied. "The student-university relationship is unique, and it should not and cannot be stuffed into one doctrinal category." Slaughter v. Brigham Young University, 514 F. 2d 622 (10th Cir. 1975).

3. In public institutions students may also have due process protections under the fourteenth amendment, with the implied contract forming the basis for a property right. Peretti, supra; Behrend, supra (no denial of due process to students when public hearings were not conducted before decision to phase out architecture school).

B. Cases addressing the rights of students and obligations of institutions when a program is discontinued

1. In circumstances where a professional school or special vocational program has been terminated, several courts have recognized a cause of action for breach of contract for enrolled students who will not have an opportunity to obtain the sought-after degree from that institution. See, e.g. Peretti, supra (termination of aviation technology program at vocational school); Behrend, supra (phase-out of school of architecture with loss of accreditation); Eden v. Board of Trustees, 374 N.Y.S. 2d 686 (1975) (effort to "close" school of podiatry prior to commencement of instruction after accepting students); Galton v. College of Pharmaceutical Sciences, Columbia University, 332 N.Y.S. 2d 909 (1972) (closing of pharmacy school).

a. In several of these cases, the courts described the implied contract as one in which the student agrees to pay all required fees, maintain the prescribed level of academic achievement and observe the school's disciplinary regulations, in return for which the school agrees to allow the student to pursue his or her course of studies and receive a degree.

b. With the exception of Eden, the courts did not enjoin the program termination in any of the cases above; rather, students were allowed to proceed with claims for money damages. Even in Eden, the court required the school to open only for the first academic year, basing its ruling largely on a finding that the decision not to open the school was arbitrary and capricious since no money would in fact be saved as a result. After the first year the students sued again, this time for money damages. The Court of Claims held that there was no breach of contract after the first year, and the students had received an adequate remedy for that year. Eden v. State, 426 N.Y.S. 2d 197 (Ct. Ct. 1980).

2. A more recent case found no breach of contract in the closure of the University of South Dakota at Springfield. Aase v. State of South Dakota, 400 N.W. 2d 269 (S.D. 1987). In rejecting the students' claim that they had a contractual right to obtain a degree from the Springfield school, the Supreme Court of South Dakota held:

We conclude, as did the trial court, that based on the record and as a matter of law the students had no enforceable contract rights against the Regents. As a general principle, the relationship between a university and a student is contractual by nature ... However, the only contract formed between the student and the school which he is attending is for the term for which the tuition is paid. See Abbariao v. Hamline University School of Law, 258 N.W. 2d 108 (Minn. 1977). In the instant case the students were permitted to complete the academic year at the Springfield campus, so no rights of the students were impaired.

3. University catalogs frequently include provisions reserving the right to withdraw courses, change the curriculum, change degree requirements, alter tuition and fees, and the like, and even without express provisions courts have found such rights to be implied. See, e.g., Cuesnongle v. Ramos, 713 F. 2d 881 (1st Cir. 1983); Mahavongsanan v. Hall, 529 F. 2d 448 (5th Cir. 1976). Whether such provisions would be found to include the right

to close a program would likely depend on the particular facts.

a. In Wagner v. Cooper Union, N.Y.L.J. Feb. 11, 1976 (Sup. Ct. N.Y.Co. 1976) the court denied a motion to preliminarily enjoin the termination of B.S. degree programs in three fields (physics, mathematics and unspecialized sciences) based in part on a statement in relevant bulletins that "The Cooper Union reserves the right to change or amend its regulations, curricula, fees and admissions procedures without prior notice." (Probably more importantly, however, the school had specifically announced to students during their freshman year that they could not graduate from the programs being terminated; their freshman year's work was basic and the credits easily transferable to other majors at Cooper Union; and several colleges in the area, at least one of which was also tuition free, would admit students who wished to transfer.)

b. In a student class action arising out of the closure of Mercer's College of Arts and Sciences in Atlanta, the trial judge ruled that a similar catalog provision did not change the implied contract that if the student complies with the terms prescribed by the university he will obtain the degree he seeks.

4. The phasing out of a program, permitting currently-enrolled students to graduate, will not necessarily protect the institution from liability for breach of contract.

a. In Behrend, supra, the students sued the university for its failure to support the architecture program at a level which it could be accredited. The court in this case found "there was an implied contract by Ohio University with these student plaintiffs that the latter be provided accredited academic training." (emphasis added)

b. In Lowenthal v. Vanderbilt University, No. A8525, slip op. (Chancery Ct., Davidson Co., Tenn. August 15, 1977), students sued for the deterioration of a new graduate management program. The court determined that Vanderbilt's contractual obligations to the students in this situation were "to provide a high quality of academic training leading to an academically respectable doctoral degree which may be earned by the satisfaction of reasonable and consistent standards and procedures" and that the university "must provide the faculty and financial resources necessary to accomplish this end."

5. With the exception of Eden, supra, the courts finding breach of contract in a program closure case have found damages to be the appropriate remedy. Elements of damages, if proved, could include (a) costs of applying to other institutions, (b) increased tuition costs at other institutions, as well as lost scholarships and grants and perhaps moving expenses, (c) possibly loss of earnings if the closure resulted in a delay in completing the program (particularly where licensure for specific employment is also delayed).

C. Planning Considerations

1. Ideally, program closures would be planned well in advance, implemented on a phased basis so that currently-enrolled students could all complete their programs, and supported with sufficient faculty and financial resources through the phase-out period so that no deterioration of the program occurred.

2. In times of austerity, the ideal may well be impossible or infeasible. Where a program must be eliminated more abruptly, preventing students from completing their programs, a number of steps can be taken by the institution to ease the transition for affected students. These will vary depending on the particular circumstances (type of program involved, time period between decision and closure, number of students affected, presence of other institutions in the area, etc.)

3. As soon as the closure decision is made, put in place a task force or similar group to deal with students' transitional needs.

4. Provide as much information to the students as possible as soon and as regularly as possible. Where a large number of students are involved, consider a regular newsletter or at least periodic letters to students updating them on arrangements being made to assist them.

5. Consider (with the faculty) making adjustments in graduation requirements to permit students to complete their degrees at the closing institution.

a. In connection with the closure of Mercer's College of Arts and Sciences in Atlanta, the faculty approved changing the residency requirement for graduation to permit more hours of transient credit to be earned at other institutions after the closure. Students may graduate and receive degrees from the College for two years following the closure.

b. The University also made available interest-free loans to assist junior and senior students in taking increased course loads in order to complete their work.

6. For students who cannot complete their programs because of the closure, attempt to make arrangements with other institutions in the area.

a. In connection with Mercer's closure of a nursing school, a neighboring university agreed to accept all of the small student body into its nursing program for the completion of their training. Mercer paid the tuition differential plus an additional modest amount to each student to cover increased incidental costs at the other institution and, in the case of the seniors, the six-month delay in graduation.

b. In the College of Arts and Sciences closure, several hundred students were affected, and their objectives for their study at the college varied widely (many were part-time or non-traditional students, and very few entered as freshmen and graduated four years later). There are also many colleges and universities in the Atlanta area, including a number of good public institutions with lower tuitions than Mercer's. In these circumstances, the University made general arrangements with many of the area institutions to facilitate transfer, covered all application fees, and entered into a specific arrangement with the most similar private institution in the area.

c. If Mercer's experience is any indication, expect other area institutions to be extremely helpful. In part, of course, the arrangements are mutually beneficial, especially where the transferee institution is concerned with its enrollment.

7. Be prepared for a great deal of misinformation and misunderstanding, as well as an unbelievable number of cases which won't fit neatly in the general arrangements you make. Assign individuals who are good listeners, communicators and problem-solvers to deal with students' individual needs.

8. If your efforts to help students complete their programs are responsible, it should not matter whether the closure might be found to be a breach of contract, since the damage from any such breach will be minimal or nonexistent.

IV. REALLOCATION OF RESTRICTED FUNDS

A. General

1. Private colleges and universities, as well as some public institutions and foundations affiliated with them, often receive gifts designated by their donors for particular purposes. Legal issues arise when the specified purposes can no longer be met (e.g. because of a program elimination) or when the institution's governing board believes the funds should, in prudence, be used for other purposes in a time of scarce resources.

2. State laws vary, and in some jurisdictions are inconsistent or not well developed, with regard to the nature of funds held by the college or university and the obligations of the governing board in the management of institutional assets. See generally Johnson, E. and Weeks, K., To Save a College: Independent College Trustees and Decisions on Financial Exigency, Endowment Use, and Closure, 12 J. Coll. and U.L. 455 (1986).

a. In the last several decades, the charitable corporation has become much more extensively used than the charitable trust as an organizational form for the operation of large complex charitable organizations such as colleges and universities, and the clear trend has been to apply corporate rather than trust principles. Stern v. Lucy Webb Hayes National Training School, 381 F. Supp. 1003 (D.D.C. 1974); The Corporation of Mercer University v. Smith, 371 S.E. 2d 858 (Ga. 1988).

i. Charitable corporations are generally said to own their assets absolutely and not in trust, although they must comply with the purposes set forth in the charter. Bogert, Trusts sec. 54 (6th ed. 1987).

ii. Colleges and universities may hold certain assets as trustee, pursuant to the terms of particular gifts. Moreover, restricted and endowment funds held by universities are more likely to be subject to trust principles than unrestricted funds.

iii. Some states have enacted legislation providing that trust principles do not apply, even to restricted funds. See O.C.G.A. sec. 14-3-113.1(c) (Ga)

b. Nevertheless, donor-imposed restrictions on gifts are binding on the institution. As

the court recognized in the leading case of St. Joseph's Hospital v. Bennett, 22 N.E. 2d 305 (1939):

No trust arises, it is true, in a technical sense from such a gift, for trustee and beneficiary are one. The charitable corporation is not bound by all the limitations and rules which apply to a technical trustee. It may not, however, receive a gift made for one purpose and use it for another, unless the court applying the cy pres doctrine so commands.

B. Uniform Management of Institutional Funds Act

1. At least 29 states have adopted (in some cases with variations) the Uniform Management of Institutional Funds Act (UMIFA).

a. UMIFA's purpose was not to change existing law but to remove concerns about potential liability and "to free trustees and managers from the alleged limitations on their powers to invest for growth and meet the financial needs of their institutions."

b. The centerpiece of UMIFA is a provision authorizing the prudent use of appreciation in endowment funds. Other provisions permit broad investment authority, authorize delegation of investment management, establish a standard of business care and prudence for governing boards in their investment responsibilities, and provide a method of releasing restrictions on the use or investment of a fund.

2. UMIFA's provision concerning release of restrictions is as follows:

(a) With the written consent of the donor, the governing board may release, in whole or in part, a restriction imposed by the applicable gift instrument on the use or investment of an institutional fund.

(b) If written consent of the donor cannot be obtained by reason of his death, disability, unavailability, or impossibility of identification, the governing board may apply in the name of the institution to the [appropriate] court for release of a restriction imposed by the applicable gift instrument on the use or investment of an institutional fund. The [Attorney General] shall be notified of the application and shall be given an opportunity to

be heard. If the court finds that the restriction is obsolete, inappropriate, or impracticable, it may by order release the restriction in whole or in part. A release under this subsection may not change an endowment fund to a fund that is not an endowment fund.

(c) A release under this section may not allow a fund to be used for purposes other than the educational, religious, charitable, or other eleemosynary purposes of the institution affected.

(d) This section does not limit the application of the doctrine of cy pres.

3. Applicable UMIFA definitions

a. "Gift instrument" means a will, deed, grant, conveyance, agreement, memorandum, writing, or other governing document, including the terms of any institutional solicitation from which an institutional fund resulted, under which property is transferred to or held by an institution as an institutional fund.

b. "Institution" means an incorporated or unincorporated organization organized and operated exclusively for educational, religious, charitable, or other eleemosynary purposes or a governmental organization to the extent that it holds funds exclusively for any of these purposes.

c. "Institutional fund" means a fund held by an institution for its exclusive use, benefit, or purposes, but does not include: (a) a fund held for an institution by a trustee that is not an institution; or (b) a fund in which a beneficiary that is not an institution has an interest, other than possible rights that could arise under violation or failure of the purposes of the fund.

4. The Commissioners' comments on the UMIFA provision concerning release of restrictions indicate that:

a. There is a need for a more expeditious way to make adjustments when the restrictions no longer serve the original purpose. Cy pres has not been a satisfactory answer and is reluctantly applied in some states.

b. Although the donor has no property interest in a fund after the gift is made, nonetheless it

is the donor's limitation that controls the governing board and if the donor agrees that the restriction need not apply the board should be free of the burden.

C. Cy Pres

1. The equitable doctrine of cy pres is applied in cases where (1) there is the presence of a valid charitable gift, (2) the specific intention of the donor has become illegal, impossible or impracticable to fulfill, and (3) there is evidence of a general charitable intent on the part of the donor. Trammell v. Elliott, 199 S.E. 2d 194 (Ga. 1973). In such cases, the court will exercise equitable powers to as nearly as possible effectuate the intention of the donor.

2. Generally, the Attorney General has exclusive standing to represent the public interest in a cy pres proceeding, although donors or their heirs may raise issues that the donor did not have a general charitable intent and thus the gift should fail and the assets be returned. Some states have enacted statutes under which charitable gifts are deemed to have been made with a general charitable intention unless otherwise provided in a written gift instrument. See, e.g. M.G.L. c. 12, sec. 8K (Mass.)

D. Practical Considerations and Approach

1. The first step in analyzing whether the institution may reallocate restricted funds is a careful review of the applicable gift instruments. Institutions undertaking such reviews frequently find that the governing documents of some funds accounted for as restricted funds use precatory language only or specifically provide that the Board may use the funds for alternative purposes under some circumstances.

a. In older institutions especially, such a review will rarely yield black and white answers in all cases. For some funds, no governing documents may be found; for others, including those where the only terms are found in fund drive materials, the terms may be ambiguous.

b. Be sure that counsel (or the accounting firm) reviewing the fund's governing documents is knowledgeable and respected. In questionable cases, an independent outside opinion may be desirable.

2. For those funds which by their terms may be used for other purposes, the Board may reallocate the funds as they deem prudent, subject to any requirements in the

governing documents, without the need for donor or court approval.

a. Note, however, that in times of scarce financial resources and program closures, any decisions to reallocate funds are likely to be highly controversial. Perceptions (even though false) that the institution cannot be trusted to carry out donors' intentions can be highly damaging.

b. If donors (or their families) are still living and involved with the institution, it may be wise to consult with them concerning alternative uses.

3. Where the gift instrument does not by its terms permit alternative uses, institutions in states which have adopted UMIFA may seek the donor's consent to release the restrictions. Even in states where UMIFA has not been adopted, there is probably little risk in reallocating funds where the donor consents. Funds with multiple donors may present special problems, and in any event the manner in which the donor's consent is obtained and documented will require special sensitivity. Insisting on a legalistic approach may be counter-productive with some donors.

4. Where the donor's consent cannot be obtained, an application to the appropriate court will generally be necessary, either under UMIFA or in a cy pres proceeding. The timing of such a proceeding will depend on the particular circumstances. Where other litigation has been brought challenging the closure, it may be wise to wait until those cases are over and some of the bitterness has dissipated before proceeding with an action to authorize reallocation. On the other hand, an action with well-considered alternative uses for each fund involved may be helpful at an early stage in stemming damaging rumors and resentments.

The Problems of Contraction: Legal Considerations in University Retrenchment

ANNETTE B. JOHNSON*

INTRODUCTION

From the mid-1950's to the mid-1960's, American colleges and universities enjoyed a decade of unprecedented growth. A flow of public funds and a sense of public purpose allowed seemingly unending expansion of enrollment, function, and physical plant in higher education. At the end of that decade, however, colleges and universities prepared to enter the 1970's on the sobering announcement that higher education was entering a period of depression.¹ As campus unrest, flamed by Vietnam war activities, polarized university students and the public, commentators warned that higher education was headed for a period of financial difficulty. A 1970 Carnegie Commission on Higher Education report found that 71% of colleges and universities studied were either headed for financial difficulty or were already experiencing financial strain.² For institutions in all categories—from the large research institutions to two-year colleges—the study found that the rate of income growth was not keeping pace with the rate of expenditure growth. While costs were rising for

* Assistant General Counsel, New York University. J.D., Univ. of Toledo; Ph.D., Univ. of Massachusetts. This article was written while the author was on the faculty of the University of Toledo College of Law; the research assistance of Frank A. DiPiero, a third-year student at the University of Toledo College of Law, is gratefully acknowledged and appreciated.

¹ See generally E. CHERT, *THE NEW DEPRESSION IN HIGHER EDUCATION* 1-7 (1971) [hereinafter cited as CHERT].

² The Carnegie Commission Report studied 41 institutions, both public and private, in six categories of size and purpose. The study was conducted in 1968; the institutions were revisited in 1970. An institution was judged in financial difficulty "if its current financial condition results in a loss of services that are regarded as part of its program or loss of quality." *Id.* at 36. Of the institutions studied, 18 (44%) were judged to be headed for financial difficulty, while an additional 11 (27%) were judged to be in actual financial difficulty. This latter group included such prestigious national universities as University of California at Berkeley, Stanford University and New York University. *Id.* at 87, 92.

faculty salaries, student aid and compensatory programs, and for insurance or repair necessitated by campus disturbances, the federal government simultaneously decreased its support of universities' research activities, and public giving declined. The financial situation was aggravated by the contemporaneous growth in the range of institutional activities and heightened level of academic aspiration made possible by the large increase in the college-going population and plant expansion. Despite the warnings offered by university presidents about the impending crisis, faculties, students, and the public generally were unaware or unconvinced of the financial stringency. The belt-tightening measures and postponements of new programs were largely imperceptible.

Since the early 1970's, however, it has become clear that the predicted depression in higher education is real, and the next decade will see a further decline. In addition to the problems of a declining rate of income growth, a decrease in public and private support, and an inflationary economy, colleges and universities must now confront the problem of declining enrollments. As demographers are fond of saying, the 18 to 22-year-olds of the coming decade are already born and countable, and beginning in 1980 a dramatic decrease in the number of 18-year-olds was expected to affect college enrollments.³ Even without taking this shift in the population into account, however, overall college enrollment in the United States is already experiencing a slight decline.⁴ As the costs of education increase, potential students may be expected to weigh the benefits of the traditional university education and choose not to invest if the value is lessened.⁵ In addition, the focus of the contemporary college student has changed from a desire to be educated in the liberal arts and humanities to an

³ A drop in the national birth rate that began in the 1960's will lead to as much as a 19% decline in the number of 18-year-olds during the 1980's, according to the United States Census Bureau.

⁴ The decrease in the number of 18-year-olds was expected to begin in 1980. Data from the Census Bureau indicated a 1.5% increase in the number of 18-year-olds in 1979 compared to 1978. Despite this increase, total enrollment in two-year and four-year colleges and universities decreased in 1978 by 0.7% compared to fall of 1977. Graduate enrollment decreased by more than 3% during the same period. *Overall College Enrollment Down Slightly, Survey Shows*, CHRON. HIGH. EDUC., March 5, 1979, at 12, Col. 1.

⁵ According to a report provided by the College Scholarship Service, the cost of going to college in 1979-80 was expected to rise an average of nine percent over the previous year. Average student costs in 1979-80 would range from a high of \$5,733 for resident students at four-year private colleges to a low of \$2,506 for commuters attending public community or junior colleges. Average student costs would exceed \$4,400 at some public universities. A few private universities predicted average student expenses of more than \$9,000 for 1979-80. *Student Costs to Rise an Average of 9 Percent Next Fall, Study Finds*, *Id.*, May 29, 1979, at 6, col. 4.

insistence that colleges and universities provide technical and professional preparation. Consequently, many individual departments or whole colleges dedicated to the liberal arts have suffered a disproportionate decrease in enrollment, while demand for business and technical courses has increased.

The responses of institutions to these problems in the early 1970's were limited in scope. In general, they consisted of postponement of new programs, reduction of services that were viewed as non-essential to the institution's academic mission, curtailment of maintenance, reduction of supplies and travel budgets, elimination of selected extracurricular and cultural services and the use of attrition to move resources between departments.⁶ Additionally, colleges and universities attempted to increase income and maintain enrollment. A number of colleges and universities contracted with professional marketing agencies to identify and attract students to their institutions.⁷ "Extended access" became the catch-word, as institutions universally altered programs and scheduling to accommodate the "non-traditional" student (the adult over 25 years of age). Few educators, however, realistically expect that the growth of this market will overcome the decline in the traditional-age population. Already, institutions that have had the luxury of maintaining a selective admissions process have reduced their standards; others that developed "open admissions" as a philosophic commitment to equality now have adopted it as an economic imperative. Under the circumstances facing higher education in the 1980's, growth is probably impossible, and most college and university administrators are reconciled to that conclusion. The education industry must now contemplate an actual contraction.

The college or university contemplating retrenchment or a reduction in its academic programs confronts serious questions relating to goals, quality, and nature of the university. The setting of academic goals and the evaluation of academic quality are areas in which col-

⁶ Cherr, *supra* note 1, at 84-90.

⁷ An increasing number of colleges and universities have turned to marketing techniques to identify and attract students. In a recent report on the deterioration of ethics on the campus, the Carnegie Council on Policy Studies in Higher Education warned colleges against compromising their admissions responsibilities and developing "fly-by-night" operations in a scramble for students. Middleton, *Student-Hungry Colleges Adopt New Techniques to Market Their Wares*, CHRON. HIGH. EDUC., April 30, 1979, at 3, col. 1.

An additional indicator of the increased competition among universities is the decreased interest in reciprocal tuition agreements for non-residents of adjacent states' universities. Jacobson, *Lowering the Tuition Barrier on the Iowa-Nebraska Border*, *Id.*, February 13, 1979, at 13, col. 1.

leges and universities have particular expertise and in which courts have traditionally refrained from interfering.⁸

Given the history of litigation involving institutions of higher education during the past two decades, as well as the importance of the retrenchment decisions to individuals' economic and career aspirations, we must expect that courts and legislatures will be called upon to deal with these questions.⁹ The over-riding legal question for the institution contemplating contraction is: how free is the university to respond to the changing nature of its mission and clientele? Is there room for an innovative redefinition of the goals and functions of the university, for preserving quality in a declining market, or must the institution suffer a uniform reduction of its current programs?

Before the university can arrive at these substantive issues, however, there are operational questions to consider: What liabilities or constraints are involved in making the decision to retrench? How is a financial situation requiring retrenchment to be defined, and by whom? Where does authority to make the retrenchment decision reside—in state coordinating boards, the institution's trustees, the college or university's administrative officers? Is there liability when the authorized decision-maker fails to act? Is participation of faculty or students in the decision and its implementation required, or can it be made and implemented entirely by the institution's managers? Must these decisions be made "in the sunshine?"

Once the decision has been made, additional operational questions, all with legal implications, arise. What constraints operate to limit decisions in the area of academic program reduction? Almost all colleges and universities in the United States employ faculty under a tenure system, and currently 62% of all college and university faculty members are tenured.¹⁰ Since program reduction must ultimately translate into the release or rearrangement of faculty, faculty tenure is an obvious barrier to institutional change, but it is by no means the only barrier to the college's or university's redefinition. Besides

⁸ The principle of judicial restraint with respect to questions of academic evaluation is well established. See, e.g., *Board of Curators v. Horowitz*, 435 U.S. 78 (1978); *Shaw v. Board of Trustees*, 549 F.2d 929, 932 (4th Cir. 1976); *Faro v. New York Univ.*, 502 F.2d 1229, 1231-32 (2d Cir. 1974).

⁹ For a discussion of the probable type and degree of judicial involvement in academic life during the decade ahead, see O'Neil, *Court and Campus—Striking & New Balance*, 1 J. COLL. & U.L. 199 (1973-74).

¹⁰ See C. BYSE & L. JOUGHLIN, *TENURE IN AMERICAN HIGHER EDUCATION* 132 (1959); Matheson, *Judicial Enforcement of Academic Tenure: An Examination*, 50 WASH. L. REV. 597, 598 (1975). While these plans vary from institution to institution, they generally provide for a probationary period after which the faculty member may not be dismissed except "for cause" and after having been accorded procedural safeguards. See discussion notes 125-141 *infra*.

the contract rights of faculty, the university's responsibilities to its various publics—students, alumni, non-faculty staff, outside contractors—and to the public interest, as expressed through its trustees, the state legislature and applicable federal laws, must be considered. What are the liabilities of universities with respect to its tenured and non-tenured faculty, to the students enrolled in programs slated for discontinuation, and to the public interest? In reorganizing or reducing responsibility of administrative staff, implementing salary reductions, postponing maintenance, and terminating or renegotiating service contracts, what are the university's liabilities and responsibilities? It is the purpose of this article to provide some guidelines for the college or university attorney or administrator planning reduction. In three major sections, it will address the questions: Which financial circumstances justify retrenchment? How and by whom should the decision be made? And finally, what are the legal limitations operating with respect to implementation of specific program reduction measures?

I. Which Financial Circumstances Justify Retrenchment?

Ideally, the decision to reduce the size of a college or university by cutting back programs, departments, or services would be made in the context of over-all long-range planning, taking into account the particular goals and strengths of the institution, and after discussion of alternatives with the various campus constituencies.¹¹ Such articulation of an institution's mission is the exception rather than the rule. Typically, colleges and universities do not deal with retrenchment until the situation is critical.¹² There are several factors militating against earlier action: 1) the tendency of administrators and faculty groups to avoid difficult decisions and to doubt that sharp action is needed until the situation becomes critical; 2) the fear that discussion of retrenchment or severe financial difficulty will destroy

¹¹ For discussion of the nature of shared governance in institutions of higher education, see J. MILLETT, *ADMINISTRATION IN HIGHER EDUCATION* 1-27 (1968); McConnell, *Faculty Government in POWER AND AUTHORITY* 98 (H. Hodgkinson & L. Meeth eds. 1971); McGrath, *Who Should Have the Power? Id.* at 187-206; American Association of University Professors, *American Council on Education & Association of Governing Boards of Universities and Colleges, Statement on Government of Colleges and Universities*, 52 AAUP BULL. 375 (1966).

¹² For a dramatic example of a university thrown into a crisis situation, the reader is referred to the history of retrenchment at the City University of New York, which experienced a reduction of almost 20% in its \$85 million budget over a two year period. In the summer of 1976, C.U.N.Y. gave 30-day termination notices to 1000 persons who had teaching or staff contracts for September 1976. Brown, Finkin, & Weisbrod, *City University of New York: Mass Dismissals under Financial Exigency*, 63 AAUP BULL. 60 (1977).

the morale of both students and faculty; and finally, 3) concern about the legal consequences attached to declaring a financial emergency prematurely.¹³ While the psychological factors are real enough and deserving of note, they are certainly to be balanced against the need of faculty and students to know as early as possible if their careers or studies are likely to be interrupted because of the institution's difficulties.¹⁴ Legally, in both public and private institutions, the existence of "financial exigency" has been recognized as a sufficient basis for the avoidance of contractual relationships on the part of the university.¹⁵ It is important to examine this concept in some detail because the evolving legal interpretation of this term allows an institution considerably more latitude than may appear initially.

Case law defining financial exigency has been predominantly concerned with termination of tenured faculty for reasons of financial exigency. Consequently, in developing a definition of financial exigency, the courts have referred to the American Association of University Professors [hereinafter "AAUP"] 1940 Statement of Principles on Academic Freedom and Tenure¹⁶ as well as to later

¹³ There are many degrees of financial difficulty, varying with the institution's articulation of its mission and objectives in terms of quality and services. Using the Carnegie Commission criteria, an institution that is able to meet current responsibilities from current income but either cannot insure that it can continue to meet current program needs or cannot insure that it can continue to meet current program needs or cannot insure for evolving program growth is deemed to be headed for financial difficulty. CHARR, *supra* note 1, at 36-41. While this description gives the greatest leeway to an institution and would allow for an early determination that their program direction should be altered, many institutions are reluctant to make retrenchment decisions at this stage. As will be discussed later in this article, students, faculty, and other groups may have a property interest in the continuation of a program that will be protected by the courts. See text accompanying notes 135-138 *infra*. While the courts have traditionally respected the right of educational institutions to make academic decisions, they have intervened when these decisions were made arbitrarily or for a discriminatory or unconstitutional reason. In order to avoid a misinterpretation of the basis of its decision, a college or university may be tempted to postpone retrenchment until it is actually in a state of "financial exigency."

¹⁴ See, e.g., the discussion of retrenchment at the University of Detroit. Cell & Kennedy, *Academic Freedom and Tenure: University of Detroit*, 64 AAUP BULL. 36, 44 (1978).

¹⁵ See generally Committee A, *Recommended Institutional Regulations on Academic Freedom and Tenure*, 62 AAUP BULL. 184, 186-97 (1976); *Scheuer v. Creighton Univ.*, 199 Neb. 618, 622, 260 N.W.2d 595, 596-97 (1977) (termination of tenured faculty members in a private institution where "financial exigency" is an express term of the tenure contract; *Krotkoff v. Goucher College*, 585 F.2d 675, 679 (4th Cir. 1978) (termination because of financial exigency is an implied term of the tenured contract, private college); *Klein v. Board of Higher Educ.*, 434 F. Supp. 1113 (S.D.N.Y. 1977) ("financial exigency" an express term in tenure contract, public university); *Johnson v. Board of Regents*, 377 F. Supp. 227, 234-35 (W.D. Wis. 1974), *aff'd*, 510 F.2d 975 (7th Cir. 1975) (public university may terminate tenured faculty for financial exigency even though no provision for termination due to financial exigency is contained in the tenure contract).

¹⁶ The major AAUP policy statements and Recommended Institutional Regulations con-

interpretations of the Statement appearing in subsequently issued Recommended Institutional Regulations [hereinafter "RIR"]. Where an institution has not adopted the AAUP Statements or the RIR they have no binding legal effect on the institution.¹⁷ However, since they have been widely adopted and endorsed by professional associations, courts have accepted AAUP Statements and the RIR as evidence of the custom and practice within educational institutions.¹⁸ The earliest contemporary cases¹⁹ dealing with financial exigency as a basis for termination of tenured faculty focused on the AAUP 1940 Statement which simply provided that "under extraordinary circumstances" a faculty member holding a continuous appointment might be terminated because of "financial exigencies." Other than a requirement that the financial exigency be "bona fide", the 1940 Statement made no further attempt to define the term.²⁰ More recently, the AAUP has proposed the 1976 Recommended Institutional Regulations on Academic Freedom and Tenure, in which a bona fide financial exigency is defined as "an imminent financial crisis which threatens the survival of the institution as a whole and which cannot be alleviated by less drastic means."²¹ As evidence that the termination is based on a bona fide financial exigency, the 1976 RIR require the institution to make every effort to place the faculty member in another suitable position in the university, to refrain from hiring new faculty members (except under extraordinary circumstances where a serious distortion in the academic program would otherwise result), and to refrain from filling the place of the faculty member by a replacement within a period of three years, unless the released faculty member has been offered and declined reinstatement. The AAUP in-

cerned with tenure and dismissal of tenured faculty members are the 1940 *Statement of Principles on Academic Freedom and Tenure*, the 1958 *Statement on Procedural Standards in Faculty Dismissal Proceedings*, and the 1976 *Recommended Institutional Regulations on Academic Freedom and Tenure*, which set forth, in language suitable for use by an institution of higher education, rules derived from the chief provisions and interpretations of the 1940 statement. The AAUP Recommendations have been adopted by many colleges and universities and incorporated into the faculty employment contract either by inclusion in the faculty policy manual or as part of the employment contract itself. 62 AAUP BULL. 184 (1976).

¹⁷ Brown & Finkin, *The Usefulness of AAUP Policy Statements*, 64 AAUP BULL. 5, 8-9 (1978).

¹⁸ At last count, 104 professional organizations in higher education had endorsed the 1940 statement. *Id.* at 7 n.2.

¹⁹ E.g., *American Ass'n of Univ. Profs. v. Bloomfield College*, 129 N.J. Super. 249, 322 A.2d 846 (1974), *aff'd*, 136 N.J. Super. 442, 346 A.2d 615 (Super. Ct. App. Div. 1975).

²⁰ *American Ass'n of Univ. Professors & Ass'n of American Colleges*, 1940 *Statement of Principles on Academic Freedom and Tenure*, 60 AAUP BULL. 269 (1947).

²¹ Committee A, *Recommended Institutional Regulations on Academic Freedom and Tenure*, 62 AAUP BULL. 184, 186 (1976).

interprets its definition of financial exigency to require that the financial difficulty be institution-wide and that all feasible alternatives short of termination have been pursued.³² By implication, the AAUP definition precludes a declaration of financial exigency based solely on current deficits in operating funds or based on a decline in student enrollments in only one division of the college or university when enrollments in other departments are strong and sufficient to provide financial support for faculty in the department where enrollment has declined.

A college or university that followed these guidelines and withheld action until the institution was in the state of emergency suggested by the 1976 RIR might find itself with little opportunity for recovery. Not unexpectedly, the developing trend in recent cases litigating the existence of financial exigency has been to adopt a broader definition of financial exigency and to allow termination of the continuous tenure contract upon a showing by the institution of a lesser degree of financial difficulty than that urged by the AAUP. In the much publicized case of *American Association of University Professors, Bloomfield College Chapter v. Bloomfield College*,³³ the New Jersey trial court considered the fact that the college owned a large tract of unused land valued between five and seven million dollars, and ordered the reinstatement of eleven tenured faculty members who had been terminated by the college on the grounds of financial exigency. While the college's management of its capital assets was not the basis of the trial court's decision, the opinion dealt at length with the potential of the college to recover if this property, which had been acquired several years before in anticipation of the creation of a new campus at a different location, were sold and the proceeds used to meet the current deficits in operating income.³⁴ Consequently, while upholding the trial court's ruling, the New Jersey appeals court took pains to point out that it would be improper for the trial judge to rest his conclusion regarding the existence of a bona fide financial exigency upon the failure of the college to sell the unused property: "Whether such a plan of action to secure financial stability on a short-term basis is preferable to the long-term planning of the college administration is a policy decision for the institution. Its choice of alternatives is beyond the scope of judicial oversight in the context of this

³² See *American Ass'n of Univ. Profs. v. Bloomfield College*, 129 N.J. Super. 249, 265-68, 322 A.2d 846, 854-55 (1974), *aff'd*, 136 N.J. Super. 442, 346 A.2d 615 (Super. Ct. App. Div. 1975).

³³ 129 N.J. Super. 249, 322 A.2d 846 (1974), *aff'd*, 136 N.J. Super. 442, 346 A.2d 615 (Super. Ct. App. Div. 1975).

³⁴ *Id.* at 261-63, 322 A.2d at 852-53.

litigation."²⁵

The United States Court of Appeals for the Fourth Circuit adopted this same position in the case of *Krotkoff v. Goucher College*.²⁶ In upholding the college's termination of a faculty member in the German department, the court reiterated the principle of judicial restraint and reluctance to oversee the decisions of college administrators reasonably made. In *Krotkoff*, the college had experienced large annual deficits aggregating more than \$1,500,000 over an extended period as well as a steady decline in enrollment. Nevertheless, it possessed a large endowment and valuable land. The Court of Appeals explicitly adopted the position, however, that financial exigency should be determined by the adequacy of a college's operating funds rather than its capital assets. The standard enunciated for testing an institution's declaration of a financial exigency was that of reasonableness and good faith on the part of the decision-makers.²⁷

In *Scheurer v. Creighton University*,²⁸ the Nebraska Supreme Court dealt with the plaintiff faculty member's contention that the financial exigency must extend to the university as a whole. In this case, the School of Pharmacy at Creighton University had operated at a deficit for five consecutive years despite ever increasing federal aid granted to the School of Pharmacy over this same period. After taking a number of intermediate steps within the School of Pharmacy (including cuts in the equipment, travel and supplies areas, termination of certain non-faculty positions and imposition of a freeze on faculty salaries), the administrators responsible for the Health Sciences Division, which was projecting a \$900,000 deficit for fiscal year 1975-76, made the decision to terminate four faculty members. It was undisputed that Creighton University as a whole was not in a state of financial exigency.²⁹ The facts in this particular case are not as persuasive as they would have been if the court had simply been asked to interpret an institution's adoption of the 1976 RIR. In this case, the faculty handbook made two references to the termination of a tenured faculty member, in one instance referring to "financial exigency on the part of the institution" as cause for termination. In another section it defined financial exigency, "which may be considered to include bona fide discontinuance of a program or department of

²⁵ 136 N.J. Super. 442, 446, 346 A.2d 615, 617.

²⁶ 585 F.2d 675 (4th Cir. 1978).

²⁷ *Id.* at 681.

²⁸ 199 Neb. 618, 260 N.W.2d 595 (1977).

²⁹ *Id.* at 623, 260 N.W.2d at 597.

instruction or the reduction in size thereof."³⁰ The Nebraska court's opinion made it clear that its decision would have been the same even without the specific contractual language which it interpreted to mean that a financial exigency within one department was sufficient cause to terminate a tenured faculty member's appointment.³¹ As the court pointed out, "common sense dictates that plaintiff's contention is untenable. To sustain it, we must hold that no tenured employee in any college may be released until the institution exhausts its assets or at the very least reaches the point where its very survival as an institution is in jeopardy."³² A further indication of this court's position, which in fact represents the trend³³ among the state and federal courts that have considered retrenchment decisions affecting tenured faculty members, is found earlier in the opinion: "The rapidly changing needs of students and society demand that university administration have sufficient discretion to retrench in areas faced with financial problems."³⁴

The cases—and the AAUP investigations of institutions' responses to financial exigency³⁵—do suggest some guidelines for colleges and universities to follow in order to support the decision that the institution's problems require retrenchment as a solution. In the cases that have been discussed, the courts have looked at both sides of the income-expenditure model, focusing on both declining enrollments and other sources of income as well as current and projected operating deficits and accumulated debts. Accordingly, to establish bona fide financial exigency, the institution should be prepared to present doc-

³⁰ *Id.*, 260 N.W.2d at 597-98.

³¹ See also *Browzin v. Catholic Univ. America*, 527 F.2d 843 (D.C. Cir. 1975). In *Browzin*, the question of whether the financial exigency must be institution-wide did not arise because the parties stipulated that the University was faced with a bona fide financial exigency at the time plaintiff's contract was terminated. However, because the reduction in faculty was coupled with a severe budget reduction in the school of Engineering and Architecture, the court in *Scheuer* read *Browzin* to suggest that a financial exigency within only one department is sufficient to justify the termination of a tenured faculty member in that department. 199 Neb. 618, 627, 260 N.W.2d 595, 599 (1977).

³² 199 Neb. 618, 631, 260 N.W.2d 595, 601.

³³ See, e.g., *Klein v. Board of Higher Educ.*, 434 F. Supp. 1113 (S.D.N.Y. 1977) (reduction in budget by 13% justified Board of Higher Education in declaring a state of financial exigency); *Bignall v. North Idaho College*, 538 F.2d 243 (9th Cir. 1976) (a reduction in enrollment in 1973 such that "the College, which had hired new faculty in 1973, was over staffed" constituted financial exigency) *Id.* at 249; *Johnson v. Board of Regents*, 377 F. Supp. 227 (W.D. Wis. 1974), *aff'd*, 510 F.2d 975 (7th Cir. 1975) (legislatively mandated 2.5% reduction in the base budget for the Wisconsin System two years in a row constitutes "financial exigency").

³⁴ 199 Neb. 618, 630, 260 N.W.2d 595, 601.

³⁵ See, e.g., *Academic Freedom and Tenure: University of Detroit*, *supra* note 14.

umentation on each of these factors.³⁵ In addition, the institution should have a long-range plan that would regain financial stability for the institution while maintaining the capacity to accomplish the particular institution's self-set mission. The analysis of declining enrollment should include not only a clear statement of enrollment trends at the institution over a period of years but also comparative data on enrollment trends at comparable institutions. The data should separately state student credit hours in different departments or divisions, and should also differentiate between full-time and part-time students. The data should be analyzed with respect to changes within the institution, including the effect of any unusual increases in tuition or charges, elimination of a program, anticipated staff reductions by attrition, expenditures of funds for student recruiting, and changes in admission requirements.

As part of analysis of current and accumulated deficits,³⁷ the institution's documentation should also include a summary of the belt-tightening measures it has already taken and the effect of the measures. Evidence that the institution has already initiated salary freezes, reduction of non-tenured staff, and elimination of non-essential services tends to demonstrate that the retrenchment decision is made in good faith.³⁸

Finally, the institution's analysis might usefully compare 1) the estimated expected changes in revenue and expenditures under existing policies in order to describe how future deficits would develop in the absence of a new policy with 2) the expected revenue and expenditures if the proposed policy changes were implemented.³⁹ In preparing such an analysis, care should be taken to avoid overstating the deficits under existing policies as well as overstating the benefits of the proposed policy changes. For example, if student enrollment declines are projected, expenditures for student services should also decrease. On the other hand, if positions are eliminated, both direct termination costs, such as severance pay, and indirect costs, such as increases in unemployment insurance assessments, must be taken into account.

³⁵ The burden of proving the existence of a state of financial exigency is usually placed on the university. See, *The Dismissal of Tenured Faculty for Reasons of Financial Exigency*, 51 IND. L.J. 417, 429-30 (1976).

³⁶ For an analysis of the major sources of income and expenditures in higher education, see generally CHITT, *supra* note 2, at 15-18; GARMA, GUTHRIE, & PIERCE, *SCHOOL FINANCE* 414-424 (1978); W. JELLEMA, *FROM RED TO BLACK?* (1973); J. MILLETT, *CONFRONTING THE NEW DEPRESSION IN HIGHER EDUCATION: TWO BUDGET EXERCISES* (1973).

³⁷ See, e.g., *Klein V. Board of Higher Educ.*, 434 F. Supp. 1113, 1116-17 (S.D.N.Y. 1977).

³⁸ *Academic Freedom and Tenure: University of Detroit*, *supra* note 14.

If an institution provides this documentation, it should have no difficulty substantiating a claim that its termination decisions were based on the financial stringencies affecting the university rather than as a pretext for terminating unpopular or unproductive tenured faculty.⁴⁰

But the question must be faced: Is it necessary that the college or university be in current financial straits? May an institution that envisions a decline in resources in the future make the decision to eliminate a program and its support staff for other than financial reasons? What if the institution is faced with an equivalent number of applicants for admission but the institution makes the decision to accept a smaller number because the quality of its applicant pool has declined? Finally, may the institution which has tenured faculty members in a department, upon review of that department, decide that its quality is not sufficiently high to justify its continuance? All these questions should be answered in the direction that gives the greatest autonomy to the institution. As the number of students declines, universities may reasonably attempt to emphasize their strengths and to reallocate resources to the areas in which they have potential for creating or preserving a national reputation. An overall reduction in the number of programs offered by any given college or university is not undesirable. In fact, the AAUP guidelines themselves allow for broad latitude in termination of faculty when a particular program has been discontinued for reasons other than financial.⁴¹ Courts that have considered cases in which the institution or a state coordinating board responsible for all colleges and universities in a system has terminated programs for reasons of quality have upheld the autonomy of the administration.⁴² Clearly, the institution

⁴⁰ The courts are alert to the obvious danger that "financial exigency" may become too easy an excuse for dismissing an unpopular or controversial faculty member. See, e.g., *Browzin v. Catholic Univ. of America*, 527 F.2d 843, 847 (D.C. Cir. 1975).

⁴¹ The section entitled "Discontinuance of Program or Department Not Mandated by Financial Exigency" in the 1976 *Recommended Institutional Regulations on Academic Freedom and Tenure*, *supra* note 16, at 187 provides for termination of faculty contracts as a result of bona fide formal discontinuance of a program or department of instruction. The expectation is that the discontinuance is based essentially on educational considerations which would be determined primarily by the faculty as a whole or an appropriate committee thereof and which do not include cyclical or temporary variations in enrollment.

⁴² In *Moore v. Board of Regents*, 59 A.D.2d 44, 397 N.Y.S.2d 449, *aff'd*, 44 N.Y.2d 593, 378 N.E.2d 1022, 407 N.Y.S.2d 452 (1978), the New York courts upheld the authority of the Board of Regents of the University of the State of New York to deny registration (and thereby discontinue) doctoral degree programs which it believed did not conform with standards set for New York institutions. After a review by an independent visitation team, the Regents determined that faculty in the doctoral program in English and History at the State University of New York at Albany were not sufficiently productive or prominent to support a doctoral program

that is prepared to eliminate a program because its quality is lower than that of the institution as a whole or for other reasons in keeping with its educational goals should have this authority, and the courts have protected the college or university's decisions in these matters provided that they are not unreasonable or arbitrary.⁴³ Because of the many interests that must be protected, however, the university contemplating program reduction for other than immediate financial reasons should proceed cautiously. Such decisions require an objective by which the decision can be judged, and point out dramatically the need for university-established goals against which the decision can be measured.⁴⁴

II. How and By Whom Should the Retrenchment Decision Be Made?

In order to discuss the focus of retrenchment decisions, it is necessary to recognize that there are in fact at least three levels of decisions: 1) the initial decision or declaration of financial exigency, 2) the intermediate decision to eliminate certain departments, programs, or positions and 3) the ultimate decision to terminate specific faculty or staff members.⁴⁵ In most colleges and universities, whether public or private, the ultimate legal responsibility for governing the institution is vested in a board of trustees.⁴⁶ In theory at least, the scope of governance vested in the trustees includes the full range of retrenchment decisions, including the duty and responsibility to act in all matters of creation or elimination of an academic department,⁴⁷ the enactment of cost-reduction matters,⁴⁸ decisions about whether to lower or maintain admissions standards,⁴⁹ decisions to reduce faculty salaries across the board,⁵⁰ and decisions to hire and termi-

and refused to recertify the programs. *Id.* at 600, 601, 378 N.E.2d at 1026, 407 N.Y.S.2d at 456.

⁴³ *Id.* at 599, 378 N.E.2d at 1025, 407 N.Y.S.2d at 455.

⁴⁴ See generally Russell, *Goal Accountability in Higher Education: Toward a Comprehensive Legal Conception of the University*, 7 J. L. & Educ. 507, 517-22 (1978).

⁴⁵ For a similar categorization of decisional levels, see the discussion of the legislative, penultimate, and ultimate levels of decision making in *Johnson v. Board of Regents*, 377 F. Supp. 277, 237-38 (W.D. Wa. 1974), *aff'd*, 510 F.2d 975 (7th Cir. 1975).

⁴⁶ See, e.g., Hornby, *Delegating Authority to the Community of Scholars*, 1975 DUKE L.J. 279, 319-20.

⁴⁷ See, e.g., *Foley v. Benedict*, 122 Tex. 193, 199, 55 S.W.2d 805, 808 (1932) (interpreting the scope of governance granted to the University of Texas Board of Regents); *Searle v. Regents of the Univ. of Cal.*, 23 Cal. App. 3d 448, 100 Cal. Rptr. 194 (1972).

⁴⁸ *Anderson v. Board of Trustees*, 55 Ill. App. 3d 937, 372 N.E.2d 718 (1978) (authority to reduce rate of compensation for summer teaching).

⁴⁹ *Foley v. Benedict*, 122 Tex. 193, 55 S.W.2d 805 (1932).

⁵⁰ *Northern Wyo. Comm. College Dist. v. Nipps*, 582 P.2d 83 (Wyo. 1978).

nate.⁴¹ In fact, however, much of the governance responsibility is exercised by the university's administrators, usually its president and chief officers.⁴² At each level of decision, the trustees may find that their decision-making power is constrained by a state-wide governing board outside the institution, by their dependence on the institution's administrators and officers for information and recommendations, or by a demand for shared governance by faculty and students from within the institution.

The Role of Trustees and Governing Boards

In public universities, decision-making authority at the initial stage may be pre-empted by the legislature or by a state-wide governing or coordinating board. As educational institutions in the sixties expanded, making greater demands on state budgets, state governments frequently insisted on more centralized control and accountability. State-wide governing boards have assumed a role in deciding which educational services will be offered by public institutions within the state.⁴³ The extent of control exercised varies from state to state and depends on whether the board is a coordinating or governing board. In many states, the board's function is merely coordinating and advisory, charged with making recommendations both to the legislature and to the individual institutions in the areas of planning, program review, data collection and budget coordination. Typically the state boards are charged with implementation of a state plan to avoid unnecessary duplication within a state and with the approval of new programs and degrees to ensure that they are actually needed and that funds are available for their support. In a smaller number of states, however, legislatures have moved to strengthen centralized control of the state's educational institutions either by consolidating all institutions in the state into one system or by granting the state-wide board governing rather than coordinating powers. In this latter case, the decision to reduce the size of a given institution or to eliminate specific educational programs may be made by the state-wide governing board rather than at the lower level. Instances of a state board mandating the elimination of particular courses or programs at institutions under its control are rare but

⁴¹ E.g., *Sittler v. Board of Control*, 333 Mich. 681, 53 N.W.2d 681 (1952); *Bellak v. Franconia College*, 118 N.H. 313, 386 A.2d 1266 (1978); *Worsella v. Board of Regents of Educ.*, 77 S.D. 447, 93 N.W. 2d 411 (1958).

⁴² E. McGrath, *supra* note 11, at 188-89.

⁴³ See generally B. HARRIS, *PERSONNEL ADMINISTRATION IN EDUCATION* (1971).

not unheard of.⁸⁴ Assuming that the board's governing authority has been legislatively or constitutionally established, such state-board-ordered program reductions will be upheld.⁸⁵

While it is possible that such state-ordered reductions will become more common, as public universities are forced to compete with other governmental agencies for scarce state funds, it is more likely that state governments and coordinating boards will exercise control by mandating (or recommending, in the case of coordinating boards) budget reductions which force the college or university into financial difficulty.⁸⁶ Academic program decisions are then left to the particular institution, and the issue then moves on to justification for the intermediate and ultimate levels of decision, made by the institution's administrators and trustees.⁸⁷

In private colleges, and in public universities not governed by a state board, the declaration of financial exigency and the formulation of a long range plan to bring the institution back to a stable condition must be made by the board of trustees.⁸⁸ It appears that the board may be vulnerable from two directions—for acting or for not acting. It is possible to imagine, for instance, a board drawn into litigation for abrogating its contract prematurely because of the board's determination that the institution has reached a critical financial state.⁸⁹ On the other hand, it is conceivable that the board would face equivalent liability for allowing the institution to exist and to incur debts or waste resources past the point of reasonableness.⁹⁰

⁸⁴ *E.g.*, *Moore v. Board of Regents*, 59 A.D.2d 44, 397 N.Y.S.2d 499, *aff'd*, 44 N.Y.593, 379 N.E.2d 1022, 407 N.Y.S.2d 452 (1978) (upholding the boards' refusal to re-register two doctoral degree programs at the State University of New York at Albany); *Hedley v. State Univ. of N.Y.*, 58 A.D.2d 576, 394, *aff'd*, 43 N.Y.2d 696, 372 N.E.2d 35, 401 N.Y.S.2d 201 (1977) (elimination of department of elementary education at State University at Stony Brook).

⁸⁵ See cases cited note 54 *supra*.

⁸⁶ *E.g.*, *Klein v. Board of Higher Educ.*, 434 F. Supp. 1113, 1118 (S.D.N.Y. 1977); *Johnson v. Board of Regents*, 377 F. Supp. 277, 236-37 (W.D. Wis. 1974), *aff'd*, 510 F.2d 975 (7th Cir. 1975).

⁸⁷ By far, the majority of cases dealing with termination of faculty for reasons of financial exigency focus on the due process requirements associated with the intermediate and ultimate decision levels. See discussion notes 125-141 *infra*.

⁸⁸ *Bellak v. Franconia College*, 118 N.H. 313, 386 A.2d 1266 (1978).

⁸⁹ *E.g.*, *American Ass'n of Univ. Profs. V. Bloomfield College*, 129 N.J. Super. 249, 322 A.2d 846 (1974), *aff'd*, 136 N.J. Super. 442, 346 A.2d 615 (Super Ct. App. Div. 1975). See also case cited note 61 *infra* and accompanying text.

⁹⁰ See, *e.g.*, the language of the Supreme Court of Ohio in *Sternberg v. Board of Trustees*, 37 Ohio St. 2d 115, 308 N.E.2d 457 (1974). Plaintiff high school students sought to enjoin the trustees from terminating a teacher training high school operated by Kent State University and staffed by the University's professors and student teachers, where the decision had already been made, and the existing facility had been completely reutilized by new programs and workshops. "[T]he public would be injuriously affected by the diversion of resources to a program

A recent case involving Wilson College,⁶¹ a 110-year-old institution for women, illustrates the dilemma faced by trustees of private colleges in this regard. After several years of declining enrollments, during which the total enrollment dropped to 200 students from an optimal enrollment of 550 or 600, the trustees of Wilson College passed a resolution in February 1979 to close the college and transfer its assets to a separate Wilson College Foundation. The college's administration had attempted to relieve the financial strain on the college through a number of economics but found itself locked into a very low (5:1) student-faculty ratio and had also begun using endowment account monies for current operating expenses. Turn-over among administrative officers was high and student recruitment efforts had been unavailing. In a suit brought by a dissenting trustee, contributing alumnae, students and a faculty member, the Franklin County Common Pleas Court found that the trustees had acted precipitously and without sufficient or valid information in taking actions to dissolve the college and consequently, the court enjoined further actions to close the college and ordered the removal from the Board of Trustees of the college's president and one other member.⁶² Rather than faulting the other members of the Board, however, the court placed responsibility on the college's president for her failure to accurately report the current enrollment and financial status of the college and for her failure to educate the board as to the charter purposes of the college, and their responsibilities to exhaust avenues to achieve the ultimate goal of maintaining Wilson College as an educational institution.

The Wilson College case calls attention to the problems in resting final liability for recognition of the financial state of the institution and for the development of long range plans to bring the institution back to a stable condition in the board of trustees. Typically, the trustees are drawn from the business or political communities and are less than thoroughly familiar with the internal workings of the institution.⁶³ While some trustees may involve themselves intimately

which would be short lived and not necessary to the maintenance of the university." *Id.* at 118, 308 N.E. at 40.

⁶¹ *Zehner v. Alexander*, 3 Franklin County Legal J. 27 (C.P., Franklin County, Pa., filed May 26, 1979).

⁶² *Id.*

⁶³ In public universities, trustees are either appointed by the governor or elected; in private universities, they derive their authority from the institutions' charters and are elected on a self-perpetuating basis by the board itself. For a discussion of the characteristics and functions of trustees of colleges and universities, see generally Carnegie Commission on Higher Education, *The University as an Organization* (J. Perkins ed. 1973).

with the day-to-day operations of the college, this is not the pattern; usually, trustees visit the campus infrequently, for monthly or quarterly meetings. Consequently, the trustees are largely dependent on the institution's current administrative officers for information about the state of the college, its strengths and feasible goals.⁴⁴ In the situation of reduction and budget cuts, however, the board is the one constituency that is sufficiently detached to represent the public interest. Individual academic departments, faculty, students, and administrators are all constituencies with vested interests in the preservations of their own or special programs, which may or may not serve the interests of the institution, or of the public generally.

While trustees cannot be expected to manage the institution, they can be expected to advise the chief executive officers, to monitor the health of the institution by requiring reports and accountability from the university administrators, and to govern the institution in crisis situations.⁴⁵ Applying this characterization of board functions to the institution that is in a state of financial stringency, it is clear that it is the trustees who must be responsible for declaring the existence of the need to reduce the college or university and to cut academic programs. The trustees have a duty to monitor the financial state of the institution and if reports and recommendations for assessing the financial state of the institution are not volunteered by the college or university administrators, the trustees have a duty to require the preparation and presentation of these reports. Finally, as the lay rulers of the university, it is the trustees' responsibility to see that policy is set to meet the academic goals of the institution and to assure that whatever plan for renewal is adopted creates the best probability of bringing the institution back on course while maintain-

⁴⁴ Russell, *supra* note 44, at 517.

⁴⁵ Soderquist, *Toward a More Effective Corporate Board: Re-examining Roles of Outside Directors*, 52 N.Y.U.L. Rev. 1341, 1358 (1977). In determining liability for trustee actions, the courts have usually considered universities to be analogous to business corporations, and have applied to the board of trustees the duties of loyalty and care. Russell, *supra* note 44, at 509. Rather than specifying the functions which directors should undertake, courts have typically skirted the issue and scrutinized the degree of care to be exercised in particular circumstances. The standard of care is that of the reasonable director, i.e., the board member should act with that degree of diligence, skill, and care which an ordinary, prudent person would exercise in a like position under similar circumstances. This test is supplemented by the business judgment rule, under which directors are absolved of liability "for honest errors, for mistakes of judgment, when they act without corrupt motive and in good faith." Soderquist, *supra*, at 1345-46. The business judgment rule comes into play when the directors act in making an affirmative judgment and not when they fail to act. Generally the courts have imposed liability for active mismanagement, fraud, or self-dealing, but rarely impose liability for an alleged failure to direct. *Id.* at 1343-45.

ing capability for achieving its educational goals. One could argue that trustees who fail to serve in these capacities should be liable for their failure to act.⁶⁶

Trustee Liability and Delegation of Authority

Because the scope of authority typically extends to governance of the entire institution, the trustees are also legally responsible for the selection of specific programs and faculty or staff members to be terminated, as well as for the initial declaration of financial exigency.⁶⁷ This responsibility grows out of the trustees' advisory role and their position as chief policy makers for the institution. Again, in practice, the trustees must depend on the president and other university officers to provide the information on which decisions can be made. Frequently, the trustees' decision will simply be a ratification of the administration's recommendation, prepared over a period of consultation with the faculty and other members of the university community and presented to the trustees for cursory review. Since the board

⁶⁶ The primary duty of the trustees in exercising care and loyalty to the institution is to assure that the institution accomplishes its educational mission, as stated in terms of long range goals. The board is responsible for setting policy for the institution. In so doing, it receives guidance from the institution's original charter if the college is a private one, or from the legislative act or state constitution creating it if the college is publicly supported. Usually, a college's charter is of little value in setting realistic goals for the trustees. For example, Dartmouth College was chartered originally to convert and educate the children of Indians, yet it has educated children of the upper classes for more than 300 years. Russell, *supra* note 53, at 519.

While such enforcement is rare, it appears unquestioned that, on the corporate analogy, state attorneys general occupy a position like that of the body of corporate shareholders in a business corporation, and may sue on behalf of the university in cases where those responsible for guiding the institution breach duties of care. It is also possible that derivative suits brought by students, alumni, or prominent contributors to the university against the trustees may succeed in the future. *Id.* at 510.

A study of the involvement of trustees in the governance of four private colleges that closed or merged with a state system between 1970 and 1974 concludes that trustees of the defunct colleges were significantly less involved in the development and implementation of policies concerning selection of a president and trustees, development of a budget and long range plan, determinations of regulations governing student life, development of salary policies, and the implementation of policies concerning fund raising. They were more involved in the development of fund raising policies and in alumni affairs. They did not differ from trustees of surviving colleges in socio-economic characteristics, in time devoted to the college, or in efforts to recruit students. Results of the survey led the author to recommend an educational program for the trustees as well as the appointment of a professional advisor to the Board of Trustees. R. Healey, *Trustees and College Failure: The Role of Governing Boards in Privately Controlled College Terminations* (June 1977) (Ph.D. dissertation in the University of Toledo Library).

⁶⁷ *Bellak v. Franconia College*, 118 N.H. 313, 386 A.2d 1266 (1978); *American Ass'n of Univ. Profs. v. Bloomfield College*, 129 N.J. Super. 249, 322 A.2d 846 (1974), *aff'd*, 136 N.J. Super. 442, 346 A.2d 615 (Super. Ct. App. Div. 1975).

bears responsibility for monitoring the actions of the university's officers, however, the board would be well advised to review such proposals carefully and decline to act unless convinced of the reasonableness of the administration's position.

Because trustees cannot be expected to manage the institution, the courts have recognized and approved a significant amount of delegation within the university system.⁶⁶ The trustees' power to delegate, however, is a limited one. A board cannot delegate powers that the law requires be submitted to the board's corporate discretion or judgment.⁶⁷ The extent of the board's governing authority is determined by the institution's charter, if it is a private college, or by the constitution or establishing legislation, in the case of a public university.⁷⁰ Typically, the scope of authority is to govern or control, and this authority has been generally interpreted by the courts to include the full power of organization and government including all powers necessary for the administration of the trust residing in the trustees.⁷¹ It definitely includes the authority to hire and discharge faculty since without this right, the board would lose its authority to control.⁷²

Consequently, when the college or university is in a state of financial exigency, the board may delegate the authority to select programs or departments for elimination to the institution's administrators or to a faculty committee. This delegation, however, is merely provisional. The decision as to which departments or programs will be reduced directly affects the educational goals and capabilities of the institution and is clearly within the trustees' scope of governance. All terminations for reasons of financial exigency must be endorsed by the board of trustees, which also retains the authority to reject recommendations presented to it by the institution's administrators

⁶⁶ Hornby, *supra* note 46, at 319. This article contains an excellent and comprehensive analysis of the scope of authority to delegate and subdelegate on the part of governing boards and trustees of public educational institutions.

⁶⁷ *Id.* at 286-89. See, e.g., *Sittler v. Board of Control*, 333 Mich. 681, 686-88, 53 N.W.2d 681, 684 (1952).

⁷⁰ Hornby, *supra* note 46, at 290; *Sittler v. Board of Control*, 333 Mich. 681, 686-88, 53 N.W.2d 681, 684 (1952).

⁷¹ E.g., *Searle v. Regents of Univ. of Cal.*, 23 Cal. App. 3d 448, 451-52, 100 Cal. Rptr. 194, 195 (1972); *Board of Regents v. Exon*, 199 Neb. 146, 149, 256 N.W.2d 330, 333 (1977); *Worzella v. Board of Regents of Educ.*, 77 S.D. 447, 450, 93 N.W.2d 411, 413 (1958).

⁷² *Board of Regents v. Exon*, 199 Neb. at 149, 256 N.W.2d at 333; *Worzella v. Board of Regents*, 77 S.D. at 450, 93 N.W.2d at 413. See also *Kisaner v. University of Miami*, 362 So. 2d 449 (1978) (Dean of College of Arts and Sciences lacks authority to bind University not to reduce a faculty member's salary); *Anderson v. Board of Trustees*, 56 Ill. App. 3d 937, 372 N.E.2d 718 (1978) (Vice-president for Academic Affairs lacks authority to bind the board of trustees in the matter of compensation to faculty members for summer teaching).

or faculty review committee. Attempts by faculty groups or the administration to restrict the board's right to terminate, for example, by adopting a policy statement that termination may be made only upon the recommendation of a faculty or administrative committee to the board of trustees, have been found to constitute an unlawful encroachment upon the board's power of control.⁷³ This power is retained even when it has previously been given to a faculty governing body.⁷⁴

There is no single suitable test for the permissibility of delegation. To determine if a delegation has occurred, the courts look to the practices within and among educational institutions as well as to paper transfers of power.⁷⁵ Consequently, if the board of trustees, or a state board with authority to order reduction, delegates the selection of programs and faculty review committee, there should be a clear articulation of the subdelegation, as well as a provision for review by the board making the delegation.

Standard of Review

In assessing the board's actions, the courts have typically given wide latitude to trustees and administrators in making decisions about academic policy matters. Unless the trustees' recommendation is that the college cease operations,⁷⁶ the courts apply an administrative law standard of review to the decisions of trustees: the decision of the board is presumed to be correct and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable. The agency's factual determinations must be accepted if supported by substantial, credible evidence.⁷⁷ Under this standard, a person challenging the board's actions would be required to show either that the trustees had acted in bad faith or that the financial stringency did not exist. The board should be prepared to satisfy the court that they had reason to believe that a bona fide

⁷³ *Worzella v. Board of Regents*, 77 S.D. 447, 93 N.W.2d 411 (1958).

⁷⁴ *Searle v. Regents of Univ. of Cal.*, 23 Cal. App. 3d 448, 100 Cal. Rptr. 194 (1972) (a standing order authorizing the academic senate to authorize and supervise all courses in the curricula does not deprive the board of its power to hire and retain faculty); *Bellak v. Franconia College*, 118 N.H. 313, 386 A.2d 1266 (1978) (where the college, by law, gave exclusive authority to consider and recommend to the board of trustees for its approval the reappointment, non-reappointment and dismissal of faculty members, the power to order termination of a faculty member for reasons of financial exigency is nevertheless reserved to the board).

⁷⁵ *Hornby*, *supra* note 46, at 300.

⁷⁶ See case cited note 61 *supra* and accompanying text.

⁷⁷ See, *The Dismissal of Tenured Faculty for Reasons of Financial Exigency*, *supra* note 36, at 429-30.

financial exigency existed and that they adopted a uniform set of procedures for meeting that emergency. The courts will not consider whether the regulations adopted by the board are wise or expedient, but merely whether they are a reasonable exercise of the power and discretion of the board.⁷⁸ It is the province of the board, acting reasonably within the powers conferred, to determine what things are detrimental to the successful management of the university. Courts will not interfere unless there is a clear abuse of the power and discretion conferred.⁷⁹

This same standard of review is applied to the retrenchment recommendations made by the college or university administration. Consequently, with the exception of the Bloomfield College case, the courts have upheld the declaration of financial exigency and the specific program reductions implemented by the institution. The language of the court in *Levitt v. Board of Trustees of Nebraska State Colleges*⁸⁰ is typical:

[W]here lack of funds necessitate[s] releasing a sizeable number of the faculty, certainly it [is] peculiarly within the province of the school administration to determine which teachers should be released, and which retained. Where there is a showing that the administrative body, in exercising its judgment, acts from honest convictions, based upon facts which it believes are for the best interest of the school, and there is no showing that the acts were arbitrary or generated by ill will, fraud, collusion or other such motives, it is not the province of a court to interfere and substitute its judgment for that of the administrative body.⁸¹

The Role of the Faculty

While it is clear that the board of trustees or designated administrator responsible for making retrenchment decisions may not unprovisionally delegate this power, the question may arise concerning the extent to which other constituencies within the university should participate in these decisions.⁸² Colleges and universities have enjoyed a long history of shared governance under which faculty members exercise primary responsibility in academic areas, including decisions on curriculum, appointment and promotion of faculty members, and evaluation of academic programs.⁸³ Certainly, as col-

⁷⁸ *Klein v. Board of Higher Educ.*, 434 F. Supp. 1113 (S.D.N.Y. 1977); *Bignall v. North Idaho College*, 538 F.2d 243 (9th Cir. 1976).

⁷⁹ *The Dismissal of Tenured Faculty for Reasons of Financial Exigency*, *supra* note 36.

⁸⁰ 376 F. Supp. 945 (D. Neb. 1974).

⁸¹ *Id.* at 950.

⁸² See notes 74 & 75 *supra* and accompanying text.

⁸³ For a brief history of the expanding role of the faculty in college governance, see E.

leges and universities have grown in size and complexity, the sense of shared purpose and common interest essential to collegiality has suffered, but faculty and students have sought and received in the past decade greater participation in the governance of the university, including in many cases membership on the college's board of trustees.⁶⁴ In addition, faculty groups have sought greater participation in decision-making at the administrative level. At most universities the 1966 AAUP position that faculty status and related matters—including appointments, promotions, the granting of tenure and dismissal—are primarily the responsibility of the faculty⁶⁵ has long been well-established. Judgment in such matters is central to general educational policy, an area in which the faculty are presumed to have expertise. More recently, the AAUP has reiterated this position, in particular applying it to the decisions of a college in the area of the apportionment of the total institutional budget to specific divisions within the college or university.⁶⁶ The AAUP statements would require participation by a representative faculty body in the decision that a condition of financial exigency exists or is imminent and that all feasible alternatives to termination of faculty had been pursued. The 1976 RIR locate the responsibility for identifying individuals whose appointments are to be terminated to a person or group designated or approved by the faculty.⁶⁷

DURVEA, EVOLUTION OF UNIVERSITY ORGANIZATION IN THE UNIVERSITY AS AN ORGANIZATION 21-22 (1973). For a more expansive description of the tensions that have developed between the concept of shared decision making and authority in a community with common interests and the concept of assumed permanent conflict of interests between faculty and administration requiring confrontation and collective bargaining, see McConnell, *Faculty Government* 98-125, in *POWER AND AUTHORITY* (H. Hodgkinson & L. Meeth eds. 1971); Howe, *Roles of Faculty*. *Id.* at 126-38.

⁶⁴ McConnell, *supra* note 11, at 120-21.

⁶⁵ See *Statement on Government of Colleges and Universities*, *supra* note 11, at 375-79.

⁶⁶ See Committee T, *The Role of the Faculty in Budgetary and Salary Matters*, 58 AAUP BULL. 170-72 (1972):

The faculty should participate both in the preparation of the total institutional budget and (within the frame-work of the total budget) in decisions relevant to the further apportioning of its specific fiscal divisions (salaries, academic programs, tuition, physical plants and grounds, etc.) . . . Circumstances of financial exigency obviously pose special problems. At institutions experiencing major threats to their continued financial support, the faculty should be informed as early and specifically as possible of significant impending financial difficulties. The faculty—with substantial representation from its non-tenured as well as its tenured members, since it is the former who are likely to bear the brunt of the reduction—should participate at the department, college, or professional school, and institution wide levels, in key decisions as to the future of the institution and of specific academic programs within the institution. The faculty, employing accepted standards of due process should assume primary responsibility for determining the status of individual faculty members.

⁶⁷ 1976 RIR, *supra* note 16.

While there are sound policy arguments why the college administration would involve the faculty in the retrenchment decision at an early stage and would give faculty the opportunity to express opinions and participate in the reduction decisions, there are equally strong policy reasons supporting the position of non-involvement. The experience of the 1970's underscores the reluctance of university administrators to make the difficult retrenchment decisions;⁸⁰ when faculty members are asked to decide on the question of their own retention, the collegial process may well break down.⁸¹ In addition, the institution may consider adverse effects on enrollment, on student and faculty morale, and on lobbying efforts for additional funds from the legislature or private benefactors caused by the on-going discussion of pending terminations.⁸²

In order to appreciate the legal claim that might be raised by faculty members who are denied participation in the retrenchment decision, it is necessary to recall the principles protecting rights of tenured faculty generally. In *Board of Regents v. Roth*,⁸³ the United States Supreme Court established that tenured faculty members have a property interest in their continued employment. At public universities, where the action of the university board of trustees or administrators is deemed to be state action, the fourteenth amendment to the United States Constitution requires that due process be afforded before the tenure faculty member is deprived of protected property rights.⁸⁴ While not every property interest is protected, the

⁸⁰ See CHERT, *supra* note 1, at 149.

⁸¹ See, e.g., *Krotkoff v. Goucher College*, 585 F.2d 675, 678 (4th Cir. 1978) (faculty committee, charged with recommending one of two German Department faculty members to be retained, refused to decide between the two professors and recommended that both be retained); *Bellak v. Franconia College*, 118 N.H. 313, 315, 386 A.2d 1266, 1268 (1978) (faculty members, knowing that some of them would have to be released, passed a resolution requesting that the board of trustees immediately declare a state of financial exigency and terminate all faculty contracts effective at the end of the academic year).

⁸² See, e.g., *City University of New York: Mass Dismissals Under Financial Exigency*, *supra* note 12, at 67, in which it is suggested that formal faculty involvement may not be feasible in certain "game-strategic" milieu. An airing of differences and priorities might have weakened the administrations bargaining position with the mayor of New York, the governor, or the legislature. Demonstrating how cuts could be made creates a greater likelihood that the legislature will refuse additional budget requests and require the reductions to be made.

⁸³ 408 U.S. 564 (1972).

⁸⁴ *Perry v. Sinderman*, 408 U.S. 593, 596 (1972). Acts of private institution may also be considered "state action" under certain circumstances. Case law exists to support the notion that significant financial or contractual ties to state or federal government agencies could trigger fifth or fourteenth amendment protection. See, e.g., *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); *Braden v. Univ. of Pittsburgh*, 552 F.2d 948 (3d Cir. 1977) (in holding that the private university may be engaged in state action, the court relied heavily upon the statutory program which spelled out the relationship between the university and the Common-

concept of interests protected by procedural due process requirements includes a broad-range of property interests secured by existing rules or understandings that stem from policy manuals of the educational institution—and that support claims of entitlements to those benefits.⁵⁵ In order to determine which rights are protected and which minimal procedural safeguards are required, it is necessary to look to the nature of the interests at stake as well as to examine the rules and regulations and policies and practices of the institution.

In at least one instance where the faculty handbook provided that tenured faculty were entitled to participate in deliberations or voting on personnel recommendations, a California court of appeals has held that the tenured faculty members have a cognizable property interest in the consultative right, and that this right could not be terminated without due process. The right to consult regarding personnel decisions affords the tenured faculty members an opportunity to influence the character of the department by having an impact on curriculum and future direction of the department. Consequently, in *Garnel v. Bunzel*⁵⁶ the California Court of Appeals reasoned that participation in faculty self-governance is a valuable component of tenure as defined by San Jose State University and could not be terminated without due process. The concept of due process, however, is a flexible one and procedural due process requirements vary with the magnitude of the interest involved.⁵⁷

In *Garnel*, the court ultimately held that the tenured faculty had not been deprived of their consultative right without due process. Under the circumstances, the opportunity to provide information to the committee which ultimately recommended the termination of the department members' rights in personnel review afforded the faculty sufficient opportunity for a hearing and provided sufficient procedural protections.⁵⁸ In *Garnel*, however, the interest of the faculty members was not as great as that of faculty members who are facing the possibility of loss of employment. When it is fairly certain that the

wealth of Pennsylvania. Other factors considered by the court included financial support from the state, the inclusion of state officials on the board of trustees, and the extent of state reporting requirements. *Id.* at 955-965.

⁵⁵ Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

⁵⁶ 68 Cal. App. 3d 999, 1007-08, 137 Cal. Rptr. 627, 632 (1977). Upon the recommendation of the university policy committee and a social science's fact-finding committee, the president of the university had placed the department in "receivership," indefinitely suspending the normal participation of the department of economics in all personnel and policy activities, because of the finding that the department had improperly blocked the promotion of a colleague.

⁵⁷ Goss v. Lopez, 419 U.S. 565, 578 (1975); Arnett v. Kennedy, 416 U.S. 134, 155 (1974); Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

⁵⁸ 68 Cal. App. 3d 999, 1008-09, 137 Cal. Rptr. 627, 632-33 (1977).

outcome of budget proceedings and allocations will result in the necessity for some faculty to be terminated, at which stage do due process protections apply?

Several federal courts have considered this question either directly or indirectly⁹⁷. The United States District Court in *Johnson v. Board of Regents of University of Wisconsin System*⁹⁸ offered a useful analysis of the claim for faculty participation at each of the several levels of decision-making involved in the retrenchment process: 1) at the gubernatorial or legislative level, when the initial decision is made to cut the budget of a university system or particular universities; 2) at the intermediate (or penultimate) stage, when decisions are made allocating reductions among departments; and 3) at the ultimate stage, when, after it has been decided which departments will experience reductions, the specific faculty members are chosen for termination. At the first two stages, the interests of individual faculty members are not personal. At most, the faculty role in reaction to gubernatorial or legislative decision to reduce the campus budget may encompass the expression of concern or the assertion of an opinion on the comparative wisdom of several courses of action, such as eliminating one campus entirely, reducing allocations for student services rather than instruction (or vice versa), or not reducing expenditures at all.⁹⁹ The faculty interest at this level is not necessarily greater than that of students or the community generally. Likewise, at the intermediate level, faculty interests are equivalent. If enrollments have declined in one department, the faculty in that department may feel more threatened, but the rights of persons, not departments, are protected by due process, and the *Johnson* court, at least, held that the faculty of one department has no federally protected right to argue that reductions should take place in another department.¹⁰⁰

The case is different, however, when the individual faculty member is identified for lay-off. At this stage, the faculty member has a protected interest in continued employment and must be afforded the opportunity to be heard. The hearing, however, need not be prior to the decision to terminate. Consequently, so long as the faculty member is granted the right to show that the termination was based on a constitutionally impermissible reason, e.g., that financial exigency did not exist, or that he or she was terminated for exercising constitu-

⁹⁷ *Bignall v. North Idaho College*, 538 F.2d 243 (9th Cir. 1976); *Chung v. Park*, 514 F.2d 382 (3d Cir. 1975); *Vance v. Chester County Board of School Trustees*, 504 F.2d 820 (4th Cir. 1974).

⁹⁸ 377 F. Supp. 227 (W.D. Wis. 1974), *aff'd*, 510 F.2d 975 (7th Cir. 1975).

⁹⁹ 377 F. Supp. 227, 237.

¹⁰⁰ *Id.* at 238.

tional rights rather than for reasons of financial exigency, at a meaningful time after the decision, the federal due process requirements will have been met.¹⁰¹ Certainly, the individual faculty member would prefer to have the opportunity to have a hearing prior to the initial decision, but this advantage must be weighed by its burdensomeness and impracticability from an institutional viewpoint. Consequently, appeals courts in the Seventh, Ninth, Third and Fourth Circuits, have rejected the argument that the hearing must be prior to the initial decision to terminate.¹⁰² To hold otherwise would bind the university to indecision.

Student Participation in Retrenchment Decisions

During the late 1960's and early 1970's many colleges and universities acceded to students' requests for a role in institutional governance. As a consequence, the college that desires to have student participation in retrenchment decisions may already have the mechanisms for such participation in existence. However, students have no greater right than faculty to be involved in the decisions as to which departments will be eliminated or reduced. In *Benner v. Oswald*,¹⁰³ the United States District Court in Pennsylvania considered the claim of undergraduate students at Pennsylvania State University that their constitutional rights had been violated by the university's refusal to allow students to participate in the election of the Board of Trustees. The university's charter provided for the election of trustees by alumni and selected agricultural and industrial groups. Although noting that it might well conclude students should be represented on the Board of Trustees and that they would make important contributions to the resolution of policy issues, the court found no right on the part of students to participate in university govern-

¹⁰¹ *Id.* at 239. The Ninth Circuit Court of Appeals in *Bignall v. North Idaho College*, 538 F.2d 243 (9th Cir. 1975), distinguished between the time of the decision to terminate and the time of the termination itself. *Bignall* seems to require that the hearing take place not before the decision to terminate, but before the actual termination of employment benefits. *But cf.* *Arnett v. Kennedy* 416 U.S. 134 (1974) (opinion of Powell, J., with which six justices were in agreement) (once tenure has been afforded, the due process clause of the fifth or fourteenth amendment determines the minimal procedural protection which must attend termination or layoff. *Id.* at 167. Powell, J., writing for four Justices in dissent, also noted that the requirements of due process can be adequately met by providing a post-termination hearing where the tenure employee is granted the opportunity for reinstatement and back pay should the initial decision to terminate be wrongful. *Id.* at 170.

¹⁰² See cases cited notes 96-97 *supra*. The situation would be different, however, if a particular institution had adopted policies or rules that afforded faculty members the right to have a hearing prior to the termination decision.

¹⁰³ 444 F. Supp. 645 (M.D. Pa. 1978).

ance and upheld the university's decision as a rational one, not unrelated to its objective of governing the university.¹⁰⁴ Similarly, the state court of appeals in *Behrend v. State*¹⁰⁵ considered specifically the issue of students' due process rights to be involved in the decision to terminate an academic program and concluded that state universities and colleges must be free to make reasonable and necessary operating decisions inherent in the functioning of an institution of higher learning, without being encumbered with the necessity of conducting a public hearing.¹⁰⁶

Alumni, Donors, and the Public Generally

There have been no cases testing the right of alumni of a particular institution to take part in retrenchment decisions; it is doubtful that the rights of graduates would be greater than those of current students. As a general rule, members of the public or contributors to an educational institution have no standing to challenge the trustees' acts of governance.¹⁰⁷ The *Wilson College*¹⁰⁸ case, however, suggests that alumni who are also contributors to an educational institution have standing to challenge some of the decisions of the Board of Trustees or the administration, at least in situations where the educational managers propose to use donated funds for some purpose other than that designated by the donor.¹⁰⁹ In addition, the state's attorney general's office is typically charged with responsibility for protecting the public interest in the preservation of charitable institutions. If an educational institution were planning to dissolve the college or a particular department for which funds had been donated, the state's attorney general might appropriately become involved in the decision.¹¹⁰

¹⁰⁴ *Id.* at 562.

¹⁰⁵ 55 Ohio App. 2d 135, 379 N.E.2d 617 (1977).

¹⁰⁶ *Id.* at 141, 379 N.E.2d at 621.

¹⁰⁷ *Zehner v. Alexander*, 3 Franklin County Legal J. 27 (C.P., Franklin County, Pa., filed May 26, 1979).

¹⁰⁸ *Id.*

¹⁰⁹ In the *Wilson College* decision, the contributing alumni were successful in seeking to enjoin the transfer of the college's assets to a newly created Wilson College Foundation which would have another purpose from that of continuing Wilson College as an educational institution. The rights of alumni and other donors in these respects are grounded in trust theory. The courts generally recognize that funds contributed to a college are held in trust by the college to be used for the specific programs designated or for the general educational purposes of the college. While it is possible to divert donated assets to another purpose, once it becomes impossible to carry out the donor's original intent, the college must seek court approval before doing so. See discussion at note 286 *infra*.

¹¹⁰ The Ohio statute is typical:

Openness of the Decision-Making Process

While faculty, students, and alumni may not have a legal right to participate in the decision-making process, they may have a legal right at least in public universities, to observe the process. As of 1976, thirty-nine states had adopted Open Meeting Statutes which require that the meetings of governing bodies of public agencies be open to the public at all times.¹¹¹ The question may arise whether the meetings of the President with the Vice President of Academic Affairs or with deans or department chairmen to discuss possible re-trenchment plans are subject to the open meeting law. Certainly, the university administrators would have reason for keeping these meetings closed. Particularly when the discussions center on alternative plans, there is an advantage to maintaining confidentiality to avoid starting disruptive rumors or speculation and unrest among members of departments that may not later suffer a cutback. The privacy of the faculty members should also be protected. The answer, however, does not appear to be clearly cut, and will depend on the particular wording of the state law. Typically, the outcome turns on the definition of "governing body," and "meeting."¹¹² It is well established that when the board of trustees delegates rule-making or policy-making authority to the president or designee of the president of the university, that body is a "governing body."¹¹³ Consequently, state courts considering the open meeting laws have held that the meetings of subordinate entities—including meetings of the law school faculty,¹¹⁴ the admissions committee for the medical school,¹¹⁵ and athletic council,¹¹⁶ the Tuition Appeal Committee¹¹⁷—are all meetings of gov-

The attorney general may investigate transactions and relationships of trustees of a charitable trust for the purpose of determining whether or not the property held for charitable, religious, or educational purposes has been and is being properly administered in accordance with fiduciary principles as established by the courts and statutes of this state.

Ohio Rev. Code Ann. § 109.24. See also discussion at notes 260-268 *infra*.

¹¹¹ Shurtz, *The University in the Sunshine: Application of the Open Meeting Laws to the University Setting*, 5 J.L. & Educ. 453 (1976).

¹¹² See, e.g., *Fain v. Faculty of College of Law*, 552 S.W.2d 752, 753 (Tenn. 1977) (meetings of faculty of college of law, deriving their authority from and empowered to make recommendations to the dean of the college, did not constitute "governing body" meetings of a public agency and therefore were not subject to the Open Meeting Act); *Cathcart v. Anderson*, 85 Wash. 2d 102, 104, 530 P.2d 313, 314 (1975) (meetings of law school faculty, empowered as agents of the board of regents to govern the immediate affairs of the law school, were meetings of a governing body and subject to the provisions of the Open Meeting Act).

¹¹³ 85 Wash. 2d 102, 107, 530 P.2d 313, 316.

¹¹⁴ See note 112 *supra*.

¹¹⁵ *Carl v. Board of Regents*, 577 P.2d 912 (Okla. 1978).

¹¹⁶ *Greene v. Athletic Council*, 151 N.W.2d 559 (Iowa 1977).

erning bodies that must be open to the public. The university confronted with persons who desire to attend retrenchment meetings might make the argument that these meetings should be exempt, based on one of two grounds: that the persons meeting do not constitute a governing body, or that the meetings are personnel meetings.

Generally, the courts have applied a broad definition to "governing body," to include any sub-group that has decision-making power.¹¹⁷ If the meeting is of persons who have the authority to carry out the recommendations that they are discussing or if the meeting is of persons who share responsibility with the convenor for exercising retrenchment decisions, the meeting will probably be considered a public meeting.

The second typical basis of exemption from the open meeting statutes, that the meeting's purpose is to discuss personnel matters, is also likely to fail. The Supreme Court of Oklahoma, in considering whether the meetings of the admissions committee of the College of Medicine should be open, considered the argument that the public's right to know should be balanced against the individual's right to privacy. Admissions decisions are based on both objective criteria and subjective criteria, including the applicant's background, personal history and family circumstances. Rejecting the privacy argument, the court pointed out that it is possible to preserve the individual's privacy by identifying each applicant by number rather than name.¹¹⁸ Similarly, in *Green v. Athletic Council of Iowa State University*,¹¹⁹ the Iowa court held that meetings of an athletic council, vested with the responsibility for determining which athletes would receive letters, scholarships and awards, were subject to the open meeting laws.

Applying these principles to meetings of administrators discussing retrenchment alternatives, it would seem likely that some courts would require the meetings to be open to the public. In principle, such meetings should be addressed to objective considerations and matters of public record, such as enrollment within particular departments, whether a faculty member is tenured or not, the length of service of a faculty member within a department, and considerations of the future direction of the university, curriculum, and long-range planning. These are subjects in which there is a strong public interest. At the ultimate level of decision-making, the selection of individual members within a department for lay-off, the university would

¹¹⁷ *Rosenberg v. Arizona Board of Regents*, 118 Ariz. 489, 578 P.2d 168 (1978).

¹¹⁸ See notes 112, 114-16 *supra*.

¹¹⁹ *Carl v. Board of Regents*, 577 P.2d 912 (Okla. 1978).

¹²⁰ 251 N.W.2d 559 (Iowa 1977).

have a stronger argument for confidentiality if the criterion for retention was a competency determination and required review of personnel files of individual faculty members for comparative purposes.¹²¹

It should be clear from this discussion that the legal responsibility and right to make decisions regarding the development and continuation of an institution's educational program resides in the college or university board of trustees and administrative officials.¹²² The wisdom of exercising this authority without seeking the participation of faculty or students is a separate decision, and will reflect for each institution its style of university governance. Certainly, the need for retrenchment forces a recentralization of decisions that might not be made if they were first subjected to public scrutiny.¹²³ While students and faculty participating in retrenchment decisions may indeed espouse self-serving positions, the institution may be served in a number of ways by broader participation in the decision-making process. The attempt, for example, to seek a reasoned consensus on financial crisis may be viewed as a demonstration of the good faith required for the declaration of a bona fide financial exigency. Public discussion, at least at the initial and intermediate stages of the decision, should serve to assure that the decisions to terminate particular programs or positions are related to the financial exigency and serve an educational purpose or advance an institutional goal for which there is broad support or, at least, understanding. Most importantly, by involving faculty, and possibly students, in the retrenchment decisions, the university may create a greater understanding and acceptance of the decisions ultimately made. This in turn should produce a more positive attitude and higher morale for those remaining at the institution that should allow the institution the greatest opportunity for getting on with the attainment of its reorganization and educational goals.

¹²¹ See, e.g., *Keyes v. Lenoir Rhyne College* 552 F.2d 579 (4th Cir. 1977), in which recognition is given to the college's interest in maintaining confidentiality of faculty evaluation records. The relevance of students' contract rights and property interests in the continuation of academic programs is discussed in section III. See text accompanying notes 232-259 *supra*.

¹²² The situation might be different, however, if the trustees and administrative officers were to decide to close a college rather than merely to terminate some courses of study. See *Zehner v. Alexander*, 3 Franklin County Legal J. 27 (C.P., Franklin County, Pa., filed May 26, 1979) and discussion note 109 *supra*.

¹²³ See P. DERREL & W. FARCEY, *RETURN TO RESPONSIBILITY* 117-18 (1972).

III. Effects of Retrenchment Decisions on Particular University Constituencies.

As colleges and universities move to reduce the institution or particular programs, the effects of their decisions will be felt differently by different constituencies, each of whom has an interest in the university. As the largest single employee group and typically the only one with a protected interest in the continuation of particular programs, the faculty, and in particular the tenured faculty, are the focus of much discussion when the retrenchment topic is broached. But untenured faculty, administrative and other staff, civil service employees and students also have an interest in the continuation of specific programs. Finally, the public, including alumni of and donors to the institution, may have an interest in how the university redefines its mission and potential. The interests of each of these constituencies will be discussed in the following section.

Faculty

Colleges and universities are labor-intensive operations; the salaries of faculty members typically approach or exceed fifty percent of a university's total budget.¹²⁴ Consequently, the institution seeking to make a serious reduction in expenditures must eliminate some of its faculty positions. In deciding how and whom, the institution must take into account the legally protected constitutional and contract rights of its faculty. At most colleges and universities in the United States faculty members are either tenured or non-tenured.¹²⁵ The rights of tenured faculty members in their continued employment are both contractual and—at public institutions, where the action of the university is deemed to be action by the state—constitutional. The rights of non-tenured faculty are primarily contractual;¹²⁶ however, in

¹²⁴ Total personnel costs approach 85% of the budget at many universities. Satyrb, *Planning for Personnel and Programmatic Retrenchment*, in *FACING FINANCIAL EXIGENCY* 67, 68 (F. Kemerer & R. Satyrb eds. 1978). At Bowling Green State University, 62.4% of the 1975-76 budget was earmarked for departmental instruction and research (including support staff). Bowling Green State University Resource Planning Handbook (financial section, chart FIN-4). At the University of Toledo, faculty compensation accounted for 42% of the 1977-78 budget. Preliminary Budget Planning Considerations (charts X, XIII, & XVII) Nov. 1977).

¹²⁵ Tenured members comprised 62% of the faculty at 2358 institutions surveyed by the AAUP for the 1977-78 academic year. The average percentage for tenured faculty is higher at public institutions (65%) than at private colleges (56%). 64 AAUP BULL. 209 (table) (1978).

¹²⁶ See, e.g., *Zimmerman v. Minot State College*, 198 N.W.2d 108, 114 (N.D. 1972). (termination of non-tenured faculty member for reasons of financial exigency. Board of Higher Education provisions regarding notice to faculty members, printed in policy statements, form a part of the faculty member's contract).

public universities, non-tenured faculty also enjoy protection from dismissal for constitutionally impermissible reasons.¹²⁷ The contract right in both cases includes all terms of the employment contract entered into by the faculty member and the university, including any procedural safeguards provided in case of dismissal.¹²⁸ Typically the employment contract incorporates by reference or by implication the faculty handbook or policy manual of the institution.¹²⁹ At both public and private universities all faculty members, both tenured and non-tenured have a right in contract to insist that the college or university follow its established procedures exactly when terminating faculty.¹³⁰ Most litigation involving tenured and non-tenured faculty members centers either on the institution's failure to follow its own procedures with respect to notification and review of the decision¹³¹ or on the institution's failure to exercise sound judgment in making the ultimate decision.¹³²

The conferral of tenure by the university creates a property interest in continued employment.¹³³ The faculty member has a legitimate claim of entitlement to continued employment based upon the rules or understandings in existence at the time that tenure was conferred.¹³⁴ While most tenure provisions provide that a tenured faculty

¹²⁷ See, e.g., *Perry v. Sindermann*, 408 U.S. 593 (1972) (dismissal of even a non-tenured faculty member may not be predicated on his exercise of first and fourteenth amendment rights); *Mustif v. Board of Trustees*, 347 So. 2d 516, 518 (Ct. App. 1977) (non-tenured faculty member alleged dismissal had been for constitutionally impermissible reasons, rather than for reasons of financial exigency as asserted by the university).

¹²⁸ See, e.g., *Vitarelli v. Seaton*, 359 U.S. 535, 547 (1959) (Frankfurter, J., concurring in part and dissenting in part) (if employment and discharge is based on defined procedure, it is a well established rule of administrative law that this procedure must be "scrupulously observed"—even if it affords the employee protection beyond normal due process requirements); This principle has been applied specifically in cases involving termination of non-tenured faculty at state colleges. *Mabey v. Reagan*, 537 F.2d 1036, 1042 (9th Cir. 1976); *Greene v. Howard University*, 412 F.2d 1128, 1131 (D.C. Cir. 1969); *Nzomo v. Vermont State Colleges*, 136 Vt. 97, 100, 385 A.2d 1099, 1101 (1978).

¹²⁹ *Zimmerman v. Minot State College*, 198 N.W.2d 108, 114 (N.D. 1972).

¹³⁰ See cases cited note 128 *supra*.

¹³¹ *Id.*

¹³² E.g., *Krotkoff v. Goucher College*, 585 F.2d 675, 682 (4th Cir. 1978); *Klein v. Board of Higher Educ.*, 434 F. Supp. 1113 (S.D.N.Y. 1977); *Bignall v. North Idaho College*, 538 F.2d 243 (9th Cir. 1976); *Johnson v. Board of Regents*, 377 F. Supp. 227 (W.D. Wis. 1974), *aff'd*, 510 F.2d 975 (7th Cir. 1975).

¹³³ In *Slochow v. Board of Higher Educ.*, 350 U.S. 551 (1956), the Supreme Court held that a tenured public college professor had an interest in continued employment protected by due process. See also *Board of Regents v. Roth*, 408 U.S. 564, 576-77 (1972).

¹³⁴ To have a property interest in a benefit, a person clearly must have . . . more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings

member can be terminated for cause or financial exigency, the faculty member cannot be denied continued employment for constitutionally impermissible reasons—those based on the exercise of a constitutionally protected interest, such as freedom of speech—or for no reason.¹³⁵ Consequently, when a tenured faculty member is terminated—or when a non-tenured faculty member is terminated or not renewed¹³⁶—the concept of substantive due process requires that the faculty member be given an opportunity to make a showing 1) that the true reason for his lay-off was a constitutionally impermissible reason or 2) that, given the chain of events preceding the ultimate decision, the termination or non-renewal was wholly arbitrary or capricious.¹³⁷ The notice, timing and nature of the opportunity to make such a showing are governed by the requirements of procedural due process.¹³⁸

In the context of non-renewal or termination of a tenured faculty member, procedural due process requires that the faculty member be given 1) notice of the reason for termination and of the opportunity to make a showing that the termination is improper and 2) a hearing that adequately provides the opportunity to make this showing.¹³⁹

When the termination is for financial exigency, there is no federal constitutional requirement with respect to the timing of the notice,¹⁴⁰ although a review of the cases suggests that 30 days prior to the date of termination is the minimum that has been tested. The college may, however, have entered into a collective bargaining agreement or be subject to state statutes or faculty policies that set a longer notice period, and in such cases, these statutes or agreements would bind the university.¹⁴¹ The college or university that fails to give notice as required by its established policies is liable for breach of contract in the case of both tenured and untenured employees.

that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

¹³⁵ *Perry v. Sindermann*, 408 U.S. 593 (1972); *Johnson v. Board of Regents*, 377 F. Supp. 227 (W.D. Wis. 1974), *aff'd*, 510 F.2d 975 (7th Cir. 1975).

¹³⁶ The principle that the government may not deny a person a benefit on the basis that infringes his constitutionally protected interest applies even to the person who has no "right" to that benefit. 408 U.S. at 597.

¹³⁷ *E.g.*, *Johnson v. Board of Regents*, 377 F. Supp. at 240.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Goss v. Lopez*, 419 U.S. 565, 575, 578 (1975); *Bignall v. North Idaho College*, 538 F.2d 243, 245-46 (9th Cir. 1976).

¹⁴¹ See note 128 *supra*.

In *Zimmerman v. Minor College*,¹⁴³ for example, the university in January 1970 notified the plaintiff, a non-tenured German instructor, that she would not be rehired for the 1970-71 academic year because of decreasing enrollment in the German department. The plaintiff, while non-tenured, had been employed by the college for more than three years.¹⁴⁴ The college's Faculty Handbook provided that notice of termination of service of faculty members for reasons of financial stress, loss of enrollment, legislative action or consolidation of departments "shall be according to the following schedule: . . . At least twelve months before the expiration of an appointment after more than two years of academic service."¹⁴⁵ Because the college had failed to comply with this notice requirement, the Supreme Court of North Dakota held the college liable in contract for damages in the amount of the plaintiff's annual salary for 1970-71, less monies actually received by her from another teaching position during that same school term.¹⁴⁶

The notice—typically a letter to the faculty member—should clearly state that the faculty member is being terminated for reasons of financial exigency.¹⁴⁷ Some courts at least will require that the written notice explicitly state that the college is experiencing exigent financial difficulties, and that these difficulties are the reason for the faculty member's nonretention.¹⁴⁸ The purpose of the notice is to give the faculty member an opportunity to challenge the grounds for his nonretention. Notice by inference—for example, rumors in the college of financial difficulties—is insufficient. Since the procedural due process requirements are applicable whenever a person's liberty interest as well as his property interest has been affected,¹⁴⁹ the university should clearly state that financial exigency is the reason for nonretention, in the case of both tenured and non-tenured faculty. Otherwise the university runs the risk of violating the faculty member's liberty interest in his good name, reputation, honor and integrity. The faculty member whose reason for nonretention is not clearly stated may find it more difficult to find subsequent employment and may attempt to bring suit against the university for violation of his liberty interest. While such a suit is likely to fail, the university

¹⁴³ 198 N.W.2d 108, 110 (N.D. 1972).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 111.

¹⁴⁶ *Id.* at 110.

¹⁴⁷ See, e.g., *Johnson v. Board of Regents*, 538 F. Supp. 227, 247.

¹⁴⁸ 538 F. Supp. 227.

¹⁴⁹ *Board of Regents v. Roth*, 408 U.S. at 569.

would naturally want to avoid the expense of the litigation.¹⁴⁹

The notice should also explain the basis for the selection of faculty members to be non-retained, since, in order for the faculty member to challenge this decision as arbitrary or capricious, it is necessary to know how the decision was made.¹⁵⁰ There is no federal constitutional requirement that the selection of faculty to be terminated be made by any particular group or person; neither is there a requirement that a particular basis for selection be applied.¹⁵¹ In some instances, state statutes, university policy or collective bargaining agreements will have provided that lay-offs be in reverse seniority order,¹⁵² or that all non-tenured faculty be laid-off before tenured.¹⁵³ In these cases, the university should state the policy and indicate the length of service used as the basis for making the decision. If exceptions to the seniority order have been made for special educational reasons, the specific reason must be stated.¹⁵⁴ Such reasons must be nondiscriminatory¹⁵⁵ and related to the needs of the retrenchment unit or college.

Selection on the basis of seniority is certainly the simplest to implement and the easiest to rationalize. It is, however, probably not the most educationally sound basis, since it would be an unlikely coincidence if the academic strengths of the university exactly coincided with the length of tenure of its faculty members. In addition, selection on the basis of seniority may adversely affect other goals of the university, such as its commitment to principles of affirmative

¹⁴⁹ The mere failure to give a reason for non-renewal of an employment contract does not impose a stigma or other disability on the terminated faculty member. *Board of Regents v. Roth*, 408 U.S. 564, 573, (1972). *But cf. Academic Freedom and Tenure: The City University of New York*, *supra* note 12:

Non-reappointment implies a competitive evaluation, in which someone is the loser. Faculty members care about these implications, which after all affect their prospects for finding another position. On the other hand, the last-minute thirty-day retrenchment notices were explicit in attributing the firing to financial exigency and low seniority—matters over which a faculty member has no control and which in no way reflects adversely on his or her academic qualifications.

Id. at 68.

¹⁵⁰ See, e.g., *Klein v. Board of Higher Educ.*, 434 F. Supp. 1113, 1119 (S.D.N.Y. 1977); *Johnson v. Board of Regents*, 377 F. Supp. 227, 241 (W.D. Wis. 1974), *aff'd*, 510 F.2d 975 (7th Cir. 1975).

¹⁵¹ *Klein v. Board of Higher Educ.*, 434 F. Supp. 1113, 1115 (S.D.N.Y. 1977) (decision made by presidents of branch campuses); *Johnson v. Board of Regents*, 377 F. Supp. 227, 238, 240 (W.D. Wis. 1974), *aff'd*, 510 F.2d 975 (7th Cir. 1975) (decision made by Chancellors).

¹⁵² See, e.g., 434 F. Supp. 1113, 1115.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 1115, 1118; *Johnson v. Board of Regents*, 377 F. Supp. 227, 239 (W.D. Wis. 1974); *aff'd*, 510 F.2d 975 (7th Cir. 1975).

¹⁵⁵ See note 156 *infra*.

action in employing women and minority group members.¹⁵⁶ Other than the natural resistance to hard decisions, there is no basis, in times of financial exigency, for universities to avoid a complete review of programs and select for continuation those that are judged to be of high quality and greatest potential.¹⁵⁷ A retrenchment policy requiring that decisions be based upon evaluations of competency and that the least competent be laid-off first, is not offensive to due process.¹⁵⁸ In order to support the decisions made after such a review, however, the university should have clearly stated academic goals, and a written retrenchment plan based on the goals and evaluations. Moreover, it should follow its retrenchment plan scrupulously in order to avoid the accusation that the nonretention decisions were actually discriminatory or arbitrary.¹⁵⁹ Typically, in considering the assertion by a faculty member that the university's retrenchment decision was arbitrary and capricious, the courts have looked at the chain of preliminary decisions prior to the decision to terminate faculty members. Such an assertion might be based upon a history of wasteful practices by the administrators, the failure of the administration to plan ahead or to reduce expenditures resulting in a last minute "wholesale" reduction of the instructional staff.¹⁶⁰ If sup-

¹⁵⁶ Minorities hired under affirmative action plans most often have the least seniority and are therefore the first terminated if the employer bases his discharge decisions solely upon the seniority system. The law is not clear on the issue of whether an employer may be liable for discrimination in this regard. Compare *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977) (bona fide seniority system is not unlawful even if it perpetuates pre-Title VII discrimination), with *United Steelworkers v. Weber*, 443 U.S. 193 (1979) (Title VII's prohibition against discrimination does not outlaw all private, voluntary, race-conscious affirmative action plans). See also Elkins, *Modifying Seniority Systems Which Perpetuate Past Discrimination*, 31 LAB. L.J. 37 (1980); Edwards, *Affirmative Action or Reverse Discrimination: The Head and Tail of Weber*, 13 CREIGHTON L. REV. 713 (1980).

¹⁵⁷ An example of a university system that undertook this difficult type of evaluation and retrenchment is the State University of New York. For a detailed account and analysis of the procedures used, see *Academic Freedom and Tenure: The State University of New York*, *supra* note 12.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ See, e.g., *Klein v. Board of Higher Educ.*, 434 F. Supp. 1113 (S.D.N.Y. 1977) (Plaintiffs' claim that their termination was arbitrary and capricious included assertions that the system managed by the Board was rife with wasteful practices and that even though the Board knew of the impending budgetary problems, they did nothing to consult, plan ahead, or save money, choosing instead to make reductions in the instructional staff at the last moment. Although the court rejected this claim, there were serious questions raised regarding the university's handling of its financial emergency. The university's refusal to compromise on the issue of tuition, insisting that either the bankrupt city government or the state government provide free tuition for all C.U.N.Y. undergraduate students was one of the most egregious examples of the Board's failure to realistically assess the final dilemma. See discussion in *Academic Freedom and Tenure: The City University of New York*, *supra* note 12.

ported, such a claim might be the basis not only for a challenge to the decisions made in connection with the retrenchment plan but also for a suit against the trustees for failure to monitor the administration of the university.¹⁶¹

The university should be able to successfully resist this challenge if it can show a history of reductions, attention to its educational mission, and adherence to this plan. Since the primary function of most universities is to teach, the university would be expected to reduce support services before reducing instructional services.¹⁶² Most universities in which the issue has been litigated have in fact followed this approach.¹⁶³ For its own purposes the university might want to document the history of planning meetings and of prior reductions. It is not necessary, however, for the university to document each of these decisions, or the procedures and grounds for them, to each faculty member at the time of termination.¹⁶⁴ It is sufficient if the faculty member is informed of the procedure for selecting individual faculty members for retention or non-retention at the ultimate decision stage.¹⁶⁵

With respect to the nature of the hearing to be provided the faculty member, questions arise concerning the timing, neutrality of the hearing officer, the extent to which it is adversarial in nature, the burden of proof, and the possible limitation of issues to be considered. As discussed previously, there is no constitutional requirement that the hearing take place prior to notice of termination.¹⁶⁶ The only mandate is that the hearing be granted "at a meaningful time and in a meaningful manner."¹⁶⁷ Since there is adequate opportunity for redress, including reinstatement and back pay if the faculty member is successful in challenging the university's decision, the courts have consistently held that the hearing required for a faculty member terminated because of financial exigency may be held after the termination.¹⁶⁸ The hearing should be held within a reasonable time after notice of the termination, however, a typical period being not sooner

¹⁶¹ See discussion at notes 53-66 *supra*.

¹⁶² *Klein v. Board of Higher Educ.*, 434 F. Supp. 1113, 1116 (S.D.N.Y. 1977).

¹⁶³ *E.g., id.* at 1117.

¹⁶⁴ *Johnson v. Board of Regents*, 377 F. Supp. 227, 241-42 (W.D. Wis. 1974), *aff'd*, 510 F.2d 975 (7th Cir. 1975).

¹⁶⁵ *Id.*

¹⁶⁶ See discussion at notes 101-102 *supra*.

¹⁶⁷ *E.g., Arnett v. Kennedy*, 416 U.S. 134 (1974); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

¹⁶⁸ *E.g., Bignall v. North Idaho College*, 538 F.2d 243, 246 (9th Cir. 1976).

than 30 days or later than 90 days after the notice.¹⁶⁹

In order to be meaningful, the hearing must be before a hearing officer who has an apparent impartiality toward the charges but who also possesses some academic expertise.¹⁷⁰ A number of plaintiffs have challenged the neutrality of the Board of Trustees as hearing officers, since the board typically orders the reduction and is concerned with the financial operation of the college.¹⁷¹ Absent some showing of prejudice, however, courts have consistently allowed boards of trustees to conduct hearings reviewing the decision to terminate faculty members.¹⁷² There is no presumption of bias or prejudice simply because the board made the initial decision to terminate.¹⁷³ Courts have also upheld the delegation of review powers to a faculty group that was appointed by the president or board which had made the original decision to terminate.¹⁷⁴ To avoid the appearance of lack of neutrality, many universities take care to assure that membership on a review committee not include anyone who has taken part in the original decision to lay off the affected faculty members.¹⁷⁵ Such an exclusion, however, is not constitutionally required.¹⁷⁶

Because the termination is for reasons of financial exigency and not "for cause," courts have generally held that the hearing is not adversarial in nature.¹⁷⁷ There is nothing about the performance, conduct, status, or omissions of the faculty members that precipitated the decision to terminate them or to eliminate the positions occupied by them. Consequently, the presentation of reasons for the initial decision to lay-off faculty need not meet the precision required in the presentation of evidence in court.¹⁷⁸ The court in *Johnson v. Board of Regents of University of Wisconsin System*¹⁷⁹ used as a guideline the standard of "reasonably adequate" with respect to the materials to be provided by the university and stated that the college must provide the following minimal procedures:

¹⁶⁹ E.g., *Klein v. Board of Higher Educ.*, 434 F. Supp. 1113, 1115 (S.D.N.Y. 1977).

¹⁷⁰ *Bignall v. North Idaho College*, 538 F.2d 243, 247 (9th Cir. 1976); *Simard v. Board of Educ.*, 473 F.2d 988, 992 (2d Cir. 1973); *Ferguson v. Thomas*, 430 F.2d 852, 856 (5th Cir. 1970).

¹⁷¹ See cases cited note 170 *supra*.

¹⁷² *Id.*

¹⁷³ *Bignall v. North Idaho College*, 538 F.2d 243, 247 (9th Cir. 1976).

¹⁷⁴ *Johnson v. Board of Regents*, 377 F. Supp. 227, 240 (W.D. Wis. 1974), *aff'd*, 510 F.2d 975 (7th Cir. 1975).

¹⁷⁵ *Id.*; *Klein v. Board of Higher Educ.* 434 F. Supp. 1113, 1116 (S.D.N.Y. 1977).

¹⁷⁶ *Johnson v. Board of Regents*, 377 F. Supp. 227, 240.

¹⁷⁷ *Id.* at 241.

¹⁷⁸ *Id.* at 241-42.

¹⁷⁹ 377 F. Supp. 227 (W.D. Wis. 1974), *aff'd*, 510 F.2d 975 (7th Cir. 1975).

furnishing each plaintiff with a reasonably adequate written statement of the basis for the initial decision to lay-off;

furnishing each plaintiff with a reasonably adequate description of the manner in which the initial decision had been arrived at;

making a reasonably adequate disclosure to each plaintiff of the information and data upon which the decision-makers had relied.¹⁸⁰

The *Johnson* court noted that what is reasonably adequate for non-adversary hearing may not be adequate for an adversary hearing,¹⁸¹ and that due process requires notice and an opportunity for a hearing appropriate to the nature of the case in light of the competing interests involved.¹⁸² In this case, the plaintiffs showed that some of the information disclosed to them was bulky and amorphous, and that they encountered difficulty in obtaining a coherent explanation of the basis for the initial lay-off decision. Applying the standard above, the court held the university's evidence sufficient to meet the less severe "reasonably adequate" standard:

The information disclosed was reasonably adequate to provide each plaintiff the opportunity to make a showing that reduced student enrollments and fiscal exigency were not in fact the precipitating causes for the decisions to lay-off tenured teachers in this department and that it was also reasonably adequate to provide each plaintiff the opportunity to make a showing that the ultimate decision to lay-off each of them, as compared with another tenured member of their respective departments, was arbitrary and unreasonable.¹⁸³

Under the Fourteenth Amendment, this is all that is required.

Neither does due process require the university, in a non-adversarial hearing, to provide the opportunity to confront or cross examine the decision-makers. If the disclosure of information prior to the hearing is reasonably adequate, the university decision-makers need not appear and submit to questioning by terminated faculty members at the review hearing.¹⁸⁴ Because faculty members have no constitutional right to participate in the early level decision that financial exigency exists, the scope of the post-termination hearing can be limited to the issues that relate to an error in the particular faculty member's case.¹⁸⁵ While the university must disclose the basis for the decision in the particular faculty member's case and provide

¹⁸⁰ *Id.* at 240.

¹⁸¹ *Id.* at 242.

¹⁸² See generally *Goss v. Lopez*, 419 U.S. 565, 579 (1975).

¹⁸³ *Johnson v. Board of Regents*, 377 F. Supp. 227, 242.

¹⁸⁴ *Id.*

¹⁸⁵ *Klein v. Board of Higher Educ.*, 434 F. Supp. 1113, 1118 (S.D.N.Y. 1977).

the faculty member an opportunity to challenge that decision and its accuracy, the university need not produce at the hearing all the information upon which the financial exigency decision was based.

In *Klien v. Board of Higher Education*,¹⁸⁶ for example, the faculty members were limited to the issues of the computation of their seniority or to a showing that the special educational reason for retaining a less senior person was a mere pretext.¹⁸⁷ This limitation of issues was held constitutionally adequate since it nevertheless allowed faculty members the opportunity to show that their termination was based on reasons other than financial exigency, or that they had been arbitrarily singled out for termination. They were given the opportunity to show that the true reason for termination was the exercise of a constitutionally protected activity or that, given the chain of decisions preceding the ultimate decision terminating a particular person, that ultimate decision was nonetheless unreasonable.

If faculty members are dissatisfied with the outcome of the hearing, they are free to appeal the decision in a court of law. Normally, the district court's hearing will not review *de novo* but will instead uphold the university's decision unless it appears arbitrary or capricious.¹⁸⁸ The circuits are split on the need to exhaust state administrative remedies before appealing to the federal district court on a claim that constitutional rights have been abridged under 42 U.S.C. Section 1983.¹⁸⁹ Usually the plaintiff in a 1983 suit need not exhaust administrative or state judicial remedies, but some circuits have held that where an adequate administrative remedy was not designed to be remedial, but instead provides a means of forestalling threatened future deprivation of civil rights, the plaintiff must exhaust the remedies.¹⁹⁰ If the hearing itself is without notice or deprives the faculty member of an opportunity to make the appropriate showing, however, then withdrawal from the university's procedure is appropriate since the remedies are constitutionally inadequate.¹⁹¹

After faculty members have been terminated for reasons of financial exigency, the question of the university's continuing responsibility to them arises. Many tenure policies provide that the position

¹⁸⁶ 434 F. Supp. 1113 (S.D.N.Y. 1977).

¹⁸⁷ *Id.* at 1118-19.

¹⁸⁸ See note 160 *supra*.

¹⁸⁹ See *Bignall v. North Idaho College*, 538 F.2d 243, 246 N.2 (9th Cir. 1976); Moskowitz & Casagrande, *Teachers and the First Amendment: Academic Freedom and Exhaustion of Administrative Remedies Under 42 U.S.C. Section 1983*, 39 ALB. L. REV. 661, 696-704 (1975).

¹⁹⁰ See note 189 *supra*.

¹⁹¹ *Bignall v. North Idaho College*, 538 F.2d 243, 246 (9th Cir. 1976); *Parker v. Letson*, 380 F. Supp. 280 (N.D. Ga. 1974); *Whitner v. Davis*, 410 F.2d 24, 28 (9th Cir. 1969).

of the terminated faculty member may not be filled by a replacement within a period of two or three years unless the terminated faculty member has been offered reinstatement to the position.¹⁹² It would be surprising if these policies received strict adherence. Educational needs of a department are not exactly defined and courts are loath to enter the area of hiring decisions.¹⁹³ From a strictly economic view point, it is advantageous to the institution to terminate more highly compensated faculty members under the guise of financial exigency and to replace them with more junior faculty or part-time faculty at lower salaries. If their replacement is undertaken in wholesale fashion, as in the *Bloomfield College* case, where the college terminated thirteen tenured faculty members and hired twelve new faculty shortly thereafter, the attempt is likely to fail if challenged by the terminated faculty members.¹⁹⁴ Irrespective of a university's policy of rehiring terminated faculty if positions reopen, such egregious action creates a strong suspicion that the financial exigency determination was not made in good faith.¹⁹⁵ On a smaller scale and particularly after a suitable grace period has elapsed, the university's discretion in describing its needs and hiring a replacement will be upheld.

In *Browzin v. Catholic University*¹⁹⁶ and *Mustiful v. Board of Trustees*,¹⁹⁷ replacement faculty were hired by the same departments from which the plaintiffs had been terminated for reasons of financial exigency. In each case, the new faculty member taught courses in the area of the terminated faculty member. Since the new faculty member also taught at least one additional course in an area the respective plaintiffs were not necessarily qualified to teach,¹⁹⁸ the courts in each case approved the university's decision to hire a replacement faculty member rather than rehire the terminated person.

Institutions that have adopted the AAUP regulations on academic freedom and tenure also pledge to make every effort to place the ter-

¹⁹² See, e.g., 1976 RIR, *supra* note 16, at 187.

¹⁹³ E.g., *Krotkoff v. Goucher College*, 585 F.2d 675, 681 (4th Cir. 1978).

¹⁹⁴ 129 N.J. Super. 249, 253-55, 322 A.2d 846, 849 (1974), *aff'd*, 136 N.J. Super. 442, 346 A.2d 615 (Super. Ct. App. Div. 1975).

¹⁹⁵ *Id.* at 271-73, 322 A.2d at 858. The courts are alert to the possibility that a university may use financial exigency as a subterfuge for the elimination of tenure at the institution. See, e.g., *Browzin v. Catholic Univ.*, 527 F.2d 843 (D.C. Cir. 1975) ("... [T]he obvious danger remains that 'financial exigency' can become too easy an excuse for dismissing a teacher who is merely unpopular or controversial or misunderstood—a way for the university to rid itself of an unwanted teacher but without according him his important procedural rights. The 'suitable position' requirement would stand as a partial check against such abuses.") *Id.* at 847.

¹⁹⁶ 527 F.2d 843 (D.C. Cir. 1975).

¹⁹⁷ 347 So. 2d 516 (Ct. App., La. 1977).

¹⁹⁸ 527 F.2d 843, 850 (D.C. Cir. 1976); 347 So. 2d 516 (Ct. App., La. 1977).

minated (or to-be-terminated) faculty member in another suitable position within the university.¹⁹⁹ This endeavor also is likely to be unsuccessful. Usually, in cases of financial exigency, a department as a whole is affected by declining student enrollments and while it is not unusual for a faculty member to prepare for and teach new courses within his own department, it is most unusual for a faculty member to change disciplines without additional training to qualify himself in the new discipline. For reasons of accreditation, as well as professional integrity, a department is unlikely to allow a faculty member without credentials in the discipline to teach in the department. It is important to note that, while courts have expressed willingness to enforce the contractual obligation of the institution to offer alternative employment if suitable, they reject the notion that the affected faculty member is entitled to training for appointment in another discipline.²⁰⁰ Consequently, the court in *Krotkoff v. Goucher College*,²⁰¹ which was willing to hold that appointment to a suitable alternative position at the college was an implied term of the tenure contract,²⁰² refused to agree with the plaintiff German instructor who sought appointment—at her same rank, salary and with tenure—in the economics department, for which she would need several years' training.²⁰³ Absent an express contractual understanding, the university has no obligation to provide training or to allow the faculty member a leave of absence to acquire it for himself.

In its attempt to reduce expenditures, a college or university may seek to consolidate departments or to effect an administrative reorganization that eliminates the position of a chairman or dean. The question may arise whether persons who hold these positions are entitled to the procedural safeguards associated with tenured faculty members. Several courts have considered this question and have uniformly held that tenure does not extend to administrative positions.²⁰⁴ The chairman or dean has tenure only to the extent that he

¹⁹⁹ 1976 RIR, *supra* note 16.

²⁰⁰ *E.g.*, *Krotkoff v. Goucher College*, 585 F.2d 675, 682 (4th Cir. 1978); *Browzin v. Catholic Univ.*, 527 F.2d 843, 867-68 (D.C. Cir. 1975).

²⁰¹ 585 F.2d 675 (4th Cir. 1978).

²⁰² *Id.* at 682.

²⁰³ *Id.* at 683.

²⁰⁴ *See, e.g.*, *VanPelt v. State Board for Comm. Colleges and Occ. Educ.*, 195 Colo. 316, 577 P.2d 765 (1978) (in his capacity as dean, plaintiff was not entitled to procedural protection extended to tenured faculty members, despite the fact that his reassignment to a faculty position resulted in a significant loss of salary); *Barnes v. Washington State Comm. College Dist.* No. 20, 85 Wash. 2d 90, 529 P.2d 1102 (1975) (college is not required to follow the procedures described by the tenure statutes and regulations when, in an administrative reorganization, the college abolished seven chairmanship positions; with respect to this "partial nonrenewal" plain-

or she has tenure in a former teaching position.³⁰⁵ The generally accepted purpose of tenure is to protect and provide security for the faculty member in scholarly or classroom activity. The interests of academic freedom are not similarly served by extending procedural protections to persons whose responsibilities involve not teaching, but administration and management, and the courts have generally endorsed the position that those ultimately responsible for the management of educational institutions should be left relatively free to remove or replace deans, directors, chairmen and other administrative personnel or to abolish their positions.

Consequently, the interest of the faculty member-turned-administrator in the administrative appointment is contractual rather than constitutional.³⁰⁶ The administrator who is removed from the administrative position and returned to teaching duties would, however, be entitled to a hearing if the removal were done in such a way that it violated the administrator's liberty interest, e.g., if it were attended by publicity and there were intimations that the removal was "for cause."³⁰⁷ In such a case, the purpose of the hearing would not be to restore the person to his administrative assignment, but to provide the former administrator the opportunity to clear his name, by requiring the university to prove, if it could, justification for its procedure.³⁰⁸

Administrative and other Staff

The college or university seeking to reduce expenditures by reorganizing or eliminating administrative or other staff positions faces fewer procedural problems than when terminating faculty members. Since administrators and other staff personnel are usually not accorded tenure in their positions,³⁰⁹ their reorganization and termination decisions are governed by general principles of contract law. Unless the contract is one for "permanent" employment, contracts fall into one of two categories with respect to duration; the contract may be either for a definite term stated or for an indefinite term.³¹⁰ If the

tiffs had no right to tenure protections).

³⁰⁵ 85 Wash. 2d 90, 94, 529 P.2d 1102, 1103; *VanPelt v. State Board for Comm. Colleges and Occ. Educ.*, 195 Colo. 316, 321, 577 P.2d 765, 769-70 (1968).

³⁰⁶ See, e.g., *Zumwalt v. Trustees of Cal. State Colleges*, 33 Cal. App. 3d 665, 674, 109 Cal. Rptr. at 353.

³⁰⁷ *Id.* at 679-80, 109 Cal. Rptr. at 353.

³⁰⁸ *Id.* at 680-81, 109 Cal. Rptr. at 354.

³⁰⁹ See discussion at notes 204-205 *supra*.

³¹⁰ A. CORBIN, *CONTRACTS* §§ 70, 96 (one vol. ed. 1952 [hereinafter cited as CORBIN]).

contract is for a definite term, the university would be free to terminate the position mid-term, but would be liable in damages for the contract price, less any sums that the employee had earned from other employment during the remainder of the term of the contract after termination.³¹¹ Given the scarcity of positions in the academic community and a reduction in staff at other colleges and universities, it is unlikely that a terminated employee would find equivalent employment in the same academic year. Consequently, the university is probably better off giving notice to the employee at an early date that the contract will not be renewed and retaining the employee until the end of the contract term.

If the employment contract does not state a specific term, the employment is deemed to be a hiring at will and the institution may terminate it at any time for any reason with impunity.³¹² The courts are divided on the effect of a contract specifying an amount of compensation per day, week, month, or year for a designated period. In a majority of states, the courts have held that employment of such unspecified duration is an indefinite hiring and no presumption attaches that it was for the period of time for which compensation was stated.³¹³ Consequently, where the contract is stated at an annual rate, and the employee is terminated after three months, courts in states that follow the majority rule would not allow the employee to recover damages for the remainder of the compensation period. In a minority of states, the courts have held that in the absence of a contrary intention, an employment contract specifying a compensation period is a contract for the designated period.

For the college or university that has entered into a collective bargaining agreement or that employs staff members through a state civil service system, the discretion to terminate employees or positions is not so broad, and the terms of the agreement or state statutes governing the employment must be consulted. The effect of state civil service systems is to create a right equivalent to tenure for the

³¹¹ CORBIN, *supra* note 210, § 958.

³¹² CORBIN, *supra* note 210, § 70. *But cf.* *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974). In *Monge*, the New Hampshire Supreme Court adopted a position that would restrict an employer's ability to terminate a contract at will. The Court upheld an award of contract damages to a woman employee who alleged that her employment had been terminated because she had resisted the advances of the foreman. While not requiring the employer to prove good faith in the termination of an employment contract that is terminable at will, the decision does allow contract damages to an employee who can establish that the discharge was malicious or in bad faith. At present, *Monge* is a minority position, but may signify a trend in the direction of restriction of employers' right to terminate.

³¹³ CORBIN, *supra* note 210, § 70.

university employee.³¹⁴ While such statutes limit the power of the university to terminate an employee except for cause, typically the state legislature has provided for termination or merger of positions either for lack of funds or for lack of work.³¹⁵

For the university seeking to reduce expenditures, there is a temptation to seek to replace civil service personnel—particularly if they are in the top of their pay range because of longevity—with student workers or non-civil employees. Particularly in the areas of maintenance and food service, colleges have found that substantial savings can be had by contracting with an independent contractor for these services rather than employing personnel in these areas directly. This is an avenue for potential savings that is not open in many states. Courts in a number of states, including New York,³¹⁶ California,³¹⁷ and Washington³¹⁸ have refused to recognize the university's right to contract with an independent contractor for services that had historically been performed by civil service employees, even if the contract would result in a substantial savings to the university. This appears to be the case whether the university is attempting to terminate and

³¹⁴ The Ohio Statute is typical:

"The tenure of every officer or employee in the classified service of the state and the counties, civil service townships, cities, city health districts, general health districts, and city school districts thereof, holding a position under this chapter of the Revised Code, shall be during good behavior and efficient service and no such officer or employee shall be reduced in pay or position, suspended, or removed, except as provided in Section 124.32 of the Revised Code, and for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of such sections or the rules of the director of administrative services or the commission, or any other failure of good behavior or any other acts of misfeasance, malfeasance, or nonfeasance in office." OHIO REV. CODE ANN. § 124.34.

³¹⁵ See, e.g., the Washington Higher Education Personnel Law, WASH. REV. CODE ANN. § 28B.16.100 (2)(g) and the interpretation of the statute in *Cunningham v. Community College Dist. No. 3*, 79 Wash. 2d 793, 489 P.2d 891 (1971) (LAYOFF). (1) An appointing authority may separate an employee without prejudice because of lack of funds or curtailment of work. WAC 251-10-030. *Id.* at 799, 489 P.2d at 894). See also *Stine v. McCaw*, 137 Ohio St. 13, 16 27 N.E.2d 488, 489 (1940) ("It is well established in Ohio that the power to create a position in the civil service includes the power to abolish the position, particularly where the purpose of the abolishment of such position is that of economy or improvement in the public service."); *Cunningham v. Community College Dist. No. 3*, 79 Wash. 2d 793, 799, 489 P.2d 891, 894 (1971).

³¹⁶ *Turel v. Delaney*, 285 N.Y. 16, 32 N.E.2d 774 (1941) (civil service laws governing selection of public servants require appointment by competitive testing and prohibit contracts with individuals to provide services).

³¹⁷ *Stockburger v. Riley*, 21 Cal. App. 2d 165, 68 P.2d 741 (1937) (services to be performed by civil servants may not be performed by independent contractor even if greater economy and efficiency can be obtained).

³¹⁸ *Washington Fed'n of State Employees, AFL-CIO Council v. Spokane Comm. College*, 90 Wash. 2d 698, 585 P.2d 474 (1978).

replace present employees³¹⁹ or simply to provide for future needs in areas not presently employing civil service employees.³²⁰ The position of the courts that have considered this question is that the civil service system protects the position, in terms of the specific type of services performed, as well as the job security of the individual employee.³²¹ In order to eliminate or merge a position, the university would be required to show either that the job functions themselves were being eliminated or that the university could no longer fund the position. The Washington court, however, would apparently allow an exception if the work otherwise could not be done because of lack of funds, and the positions would have been abolished for lack of funds.³²² This exception grows out of litigation that resulted when Works Progress Administration employees replaced civil service employees, however, and may not be generally applicable when the replacement results in less than a complete costs savings. The proof required to show that the lay-off occurred because of lack of funds would be similar to that required of a university alleging financial exigency as the basis for the termination of tenured faculty members and would include an analysis of expenses, cash flow projections, and estimates of the costs of the services to students.³²³ "Lack of work" as the basis for lay-off of civil service employees is established by the

³¹⁹ In *Cunningham v. Community College Dist. No. 3*, 79 Wash. 2d 793, 489 P.2d 891 (1971), the Supreme Court of Washington ordered the reinstatement of eight food service employees of the state community college. The college had employed civil service employees to staff a snack bar open six hours a day, but in making the decision to offer full meal service in a newly constructed dormitory, it decided to contract with an outside firm for food service. The court noted that the university would be justified in laying-off the civil service workers if the college decided not to offer food service to students or if there were other circumstances establishing work curtailment and a corresponding merger of positions, but such was not the case, since the college was actually expanding its food service to students. The court would not accept as determinative the belief on the part of the college administrators that independent contracting would be less expensive without an analysis of food service capability, expense and cash flow projections, and estimates of meal costs to customers.

³²⁰ In *Washington Fed'n of State Employees, AFL-CIO Council v. Spokane Comm. College*, 90 Wash. 2d 698, 585 P.2d 474 (1978), the college had sought to provide custodial services to a newly constructed college building by contracting with an independent maintenance firm. Although no civil service employees were displaced as a result of the contract, the court held that the college had no authority to contract for services that had regularly and historically been performed by civil service employees. The court noted that it would grant an exception to this holding, however, if civil service employees were unavailable or incapable of performing the work that needed to be done. The dissent took the position that the civil service system was designed to protect established employee relationships, not the functions performed by civil service employees. *Id.* at 705, 585 P.2d at 479 (Hicks, J., dissenting).

³²¹ *Id.* at 704, 585 P.2d at 478.

³²² *Cunningham v. Community College Dist. No. 3*, 79 Wash. 2d 793, 489 P.2d 891, 896 (1971).

³²³ *Id.* at 799, 489 P.2d at 895-96.

elimination of the job function or its merger into another position without hiring a replacement.²³⁴

In *Sigall v. Aetna Cleaning Contractors of Cleveland*,²³⁵ the Ohio Supreme Court took a different approach, concluding that the purpose of civil service regulations was the protection of individual employees' tenure in public service.²³⁶ Somewhat different factually from the cases considered in other jurisdictions discussed above, the *Sigall* case involved Kent State University's contract with a private maintenance firm for approximately 20% of its custodial work. Evidence presented at trial shows that the cost savings to the university as a direct result of contracting out custodial services amounted to \$300,000 per year in personnel costs alone.²³⁷ The university also demonstrated that it had been unable for a number of years to maintain a custodial staff of civil service employees. Turnover rate among civil service custodial employees averaged 28-30% per year and on any given day between five and fifteen vacancies existed in the university's 125-person custodial work force.²³⁸ Although the court noted that civil service position might be eliminated for reasons of economy, the cost savings to the university was not determinative. Rather, the court's decision focused on the purpose of the civil service system as a means of guaranteeing merit selection of employees for public service positions and for assuring such employees tenure

²³⁴ *Id.* at 799, 489 P.2d at 896.

²³⁵ 45 Ohio St. 2d 308, 345 N.E.2d 61 (1976).

²³⁶ Compare, e.g., the court's statement in *Curtis v. State*, 108 Ohio St. 292, 140 N.E. 522 (1923) regarding the purpose of the civil service system:

There is nothing complex or difficult to understand about civil service laws and rules. The fundamental purpose is to establish a merit system, whereby selections for appointments in certain branches of the public service may be made upon the basis of demonstrated relative fitness, without regard to political considerations. To carry out this purpose elaborate rules have been formulated, designed to facilitate its operation, but not to extend it beyond its legitimate limits.

Id. at 296, 140 N.E. at 523, with the statement of purpose in the Washington State Higher Education Personnel Law:

The interests of state institutions of higher education and the employees of those institutions will be furthered by the enactment of a system of personnel administration designed specifically to meet particular needs in connection with employer-employee relations in the state institutions of higher education. The general purpose of this chapter is to establish a system of personnel administration for the institutions of higher education in the state which is based on merit principles and scientific methods, and which governs the appointment, promotion, transfer, layoff, recruitment, retention, classification and pay plans, removal, discipline, and welfare of employees covered under the chapter.

WASH. REV. CODE ANN. § 28B.16.010.

²³⁷ 45 Ohio St. 2d 308, 310, 345 N.E.2d 61, 65.

²³⁸ *Id.*

during good behavior and efficiency.³²⁹ Since no civil service employees had been displaced, the purpose of the civil service system had not been thwarted.

Since most universities seeking to replace civil service employees with independent contracts would indeed be seeking to thwart the civil service system, the Ohio case will not be widely useful as a precedent, although it does suggest an approach for universities that have had perennial difficulty in locating civil service personnel, particularly in high-turnover areas such as maintenance and food service.³³⁰

Students

In times of financial difficulty for educational institutions, students may be affected at both ends of the income-expenditure dilemma. Colleges and universities will undoubtedly seek to increase tuition and instructional fees in order to increase income, particularly if revenue from other sources decreases.³³¹ In addition, programs in which students are enrolled may be affected by reduction or elimination. In either situation, it is well settled that the rights of students vis-à-vis the college or university are governed by contract principles,³³² the chief of which is that a contract must be performed or the promissor must respond in damages, even if performance becomes difficult or extremely onerous.³³³ To discover the terms of the student-university contract, the courts look at the institution's catalogue, its brochures and program descriptions as well as any other representations made to students at the time of their enrollment.³³⁴ A host of cases brought by students in the past decade to enforce promises contained in the institution's catalogue convinced most colleges and universities to review these materials with an eye toward qualifying program state-

³²⁹ *Id.* at 314-15, 345 N.E.2d at 65.

³³⁰ The general rule is that public services are to be performed whenever practicable by public employees. Neither a private individual nor a firm may be hired to perform the normal or routine duties of a public agency. The agency may, however, "farm-out" work which is beyond the capacity of the agency to undertake. If the contract establishes no more than an employer-employee relationship, the merit system of filling public employments would be violated. H. KAPLAN, *THE LAW OF CIVIL SERVICE* 98-99 (1958).

³³¹ See note 5 *supra*.

³³² See, e.g., *Zumbrun v. University of S. Cal.*, 25 Cal. App. 3d 1, 10, 101 Cal. Rptr. 499, 504 (1972); *University of Miami v. Militana*, 184 So. 2d 701, 704 (Dist. Ct. App. 1966); *Auser v. Cornell Univ.*, 71 Misc. 2d 1084, 1088, 377 N.Y.2d 878, 882, 337 N.Y.S.2d 878 (Sup. Ct. 1972).

³³³ *RESTATEMENT (SECOND OF CONTRACTS)* § 1 (1964); *RESTATEMENT (FIRST OF CONTRACTS)* §§ 314, 454, 455 (1932).

³³⁴ See note 232 *supra*.

ments,³³⁶ so that students would not expect that particular courses would be available every semester, or that they should not depend on admission to every course for which they desired to register. It is unlikely, however, that many institutions have yet to incorporate a statement to the effect that, for reasons of financial exigency, the college or university may terminate certain enumerated programs during the time of the prospective student's residency, or that during this period, tuition increases may be large and erratic. Yet, these are the situations that may produce future litigation.

With respect to tuition increases, the courts that have considered students' claims that tuition increases were unreasonable or in breach of their contract of enrollment, have been sympathetic with the university, adopting the position that they will not require the colleges to operate at a financial loss.³³⁷ Consequently, in *Basch v. George Washington University*,³³⁸ the court found that there had been no breach of contract by the university in raising the academic year tuition for medical students from \$3200 for 1974-75 to \$5000 for 1975-76, in spite of the fact that the university's bulletin stated that tuition increases had been estimated at \$200 per year through 1978-79. Noting that the terms in a university's bulletin become part of the contract between the university and the student, the court nevertheless declined to find the language regarding projected increases sufficient to support a finding that this language amounted to a contractual obligation.³³⁹

Since bulletins generally contain a great deal of information for prospective students, it is necessary to look to general principles of contract construction to determine whether a particular section of the bulletin also becomes part of the contractual obligation between the student and the university.³⁴⁰ Viewing the language of the bulletin as a whole, the court in this case found that a reasonable person would not have concluded that the university intended to bind itself

³³⁶ For a discussion of student suits based on claims made in college and university bulletins see, e.g., Note, *Consumer Protection and Higher Education—Student Suits Against Schools*, 37 OHIO ST. L.J. 608 (1976).

³³⁷ E.g., *Basch v. George Washington Univ.*, 370 A.2d 1364, 1368 (D.C. 1977).

³³⁸ *Id.*

³³⁹ 370 A.2d 1364, 1366 (D.C. 1977).

If from a promise, or manifestation of intention, or from the circumstances existing at the time, the person to whom the promise or manifestation is addressed knows or has reason to know that the person making it does not intend it as an expression of his fixed purpose until he has given a further expression of assent, he has not made an offer.

RESTATEMENT (FIRST) OF CONTRACTS § 25 (1932).

³⁴⁰ 370 A.2d 1364, 1367.

to annual increases of \$200. Not only do the words in the bulletin fail to indicate intent to be bound on the part of the university, they are also sufficiently lacking in definiteness as to preclude enforcement. At best, they suggest an expectancy, and a mere expectancy is not sufficient to create a binding contract.³⁴⁰

In a similar suit, *Eisele v. Ayers*,³⁴¹ second and third-year medical students at Northwestern University charged that the university had breached its contract with them by instituting a tuition increase in excess of \$2500 for the 1977-78 academic year. The language in the university's catalogue stated that "tuition and fees are . . . subject to change on short notice" and that "applicants should anticipate continuing yearly increases."³⁴² Increases in previous years had averaged approximately \$400. The student plaintiffs advanced a number of theories to support their claim for damages and a declaration that the university could not obtain a tuition increase greater than the average increase imposed over the past decade. The court, however, focused on the primary allegation that, because of the minimal attrition rates at medical schools throughout the country, plaintiffs were unable to transfer to another school and therefore the university's contract with the students constituted a contract of adhesion prepared solely by the university and leaving the students with the sole alternative of paying the increased tuition.³⁴³ In response to this allegation, the court specifically considered two questions: whether the university had contracted that future tuition increases would be kept within the average range of increases imposed over the previous years and whether the university was bound by a standard of reasonableness in exercising their right to raise tuition rates. Citing *Basch*, this court also found the catalogue language not sufficiently specific to be enforced and gave effect to the university's reservation of the right to increase tuition.³⁴⁴ The court likewise rejected the plaintiff's contention that the university must be bound to a standard of reasonableness in raising tuition. Absent an allegation that the university has exercised its right maliciously or in bad faith, the court found nothing inherently wrong or oppressive in the university's decision to raise the tuition. In both *Eisele* and *Basch*, the courts deferred to the

³⁴⁰ *Id.* at 1368. "An offer must be so definite in its terms or require such definite terms in the acceptance, that the promises and performances to be rendered by each party are reasonably certain." RESTATEMENT (FIRST) OF CONTRACTS § 32 (1932).

³⁴¹ 63 Ill. App. 3d 1039, 381 N.E.2d 21 (1978).

³⁴² *Id.* at 1041, 381 N.E.2d at 24.

³⁴³ *Id.*

³⁴⁴ *Id.* at 1044, 381 N.E.2d at 26.

university's decisions regarding academic quality and the financing of academic programs. In *Basch*, the medical school had experienced a significant reduction in federal funding of its programs, and the large tuition increase had been based upon the deficit this created.³⁴⁵ In *Eisele*, however, in addition to a similar decrease in income from federal sources, the university listed as a secondary reason for the large tuition increase the creation of a reserve that would enable the school to extend grants to students without financial resources to attend Northwestern, while imposing a greater burden on those better able to afford it.³⁴⁶ In upholding the institution's right to increase tuition significantly, both courts were affirming the school's right to determine the quality (and cost) of education that would be provided as well as the right of the university to impose additional costs on some students in order to be able to select a highly qualified student body on the basis of academic achievement rather than have students select the university on their ability to pay.

With respect to the university's right to terminate programs in which students are enrolled, the institution's position is more precarious. While a review of the cases produces few that are directly on point,³⁴⁷ it is reasonable to expect the courts, while upholding the right of the board of trustees to make policy decisions concerning the continued existence of a department, nevertheless to require the university to respond in damages to students harmed by these decisions.³⁴⁸ Courts have given effect to the student's reasonable expectation that if he pays his fees and performs the academic work required, he will receive the degree he seeks.³⁴⁹ If a department is to be eliminated, the university has a responsibility in contract to provide that students enrolled in that department have an opportunity to graduate and receive the degree that they were seeking when they enrolled. In a situation in which students would seek to enforce this right, the university's most appropriate defense would be impossibility of performance. Under general contract principles, the university's promise of an academic departments continued existence may be excused if an unexpected event or unanticipated circumstance renders performance either impossible or vitally different from what

³⁴⁵ 370 A.2d 1364, 1366.

³⁴⁶ 63 Ill. App. 3d 1039, 1042, 381 N.E.2d 21, 24.

³⁴⁷ For a discussion of the implied contract that exists between a university and its students, see generally *Zumbrun v. University of S. Cal.*, 25 Cal. App. 3d 1, 101 Cal. Rptr. 499 (1972); *Carr v. St. John's Univ.*, 17 A.D.2d 632, 231 N.Y.S. 2d 410 (1962).

³⁴⁸ E.g., *Behrend v. State*, 55 Ohio App. 2d 135, 141, 379 N.E.2d 617, 621 (1977).

³⁴⁹ E.g., *Ross v. Pennsylvania State Univ.*, 445 F. Supp. 147, 152 (M.D. Pa. 1978).

would have been in the contemplation of the parties at the time they contracted.³⁸⁰ However, a party may not, by his own conduct, create the event causing the impracticability of performance; in fact, the promisor must make all reasonable efforts to avoid the "impossibility."³⁸¹

Applying these principles to the situation in which a university eliminates a department because the institution is in a situation of financial exigency, it is doubtful that the claim of financial exigency would excuse the university from its contractual obligations with students enrolled in that department. While it may be impossible for the college to continue all departments and services, it is not actually impossible for the college to continue any particular program. The decision to discontinue certain programs and to maintain others is a matter of choice on the part of the university; the college makes a selection of academic goals and acts accordingly, but in doing so, the university is creating the impossibility of performance and consequently may not be excused on this basis.³⁸² In the case of upper-class undergraduate students, graduate students, or other students in individualized programs, it may be difficult if not impossible for them to transfer to another college or university with credit granted for the work completed. If they are unable to so transfer, the college or university discontinuing its programs may be liable in damages.

An Ohio case, *Behrend v. State*,³⁸³ offers some guidance on this point. In that case, the students in the school of architecture brought suit against Ohio University for breach of contract in failing to maintain its accreditation with the National Architectural Accrediting Board. Although the School of Architecture had lost its accreditation in 1969, the plaintiff students had been assured that the university was working toward reaccreditation and that if the students attended the School of Architecture and worked extremely hard, they could

³⁸⁰ "... [I]mpossibility means not only strict impossibility but impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved." *RESTATEMENT (FIRST) OF CONTRACTS* § 454 (1932). "Except as stated in § 455, where, after the formation of a contract facts that a promisor had no reason to anticipate, and for the occurrence of which he is not in contributing fault, render performance of the promise impossible, the duty of the promisor is discharged, unless a contrary intention has been manifested, even though he has already committed a breach by anticipatory repudiation . . ." *Id.* § 457.

³⁸¹ "Impossibility of performing a promise that is not due to the nature of the performance, but wholly to the inability of the individual promisor, neither prevents the formation of a contract nor discharges a duty created by a contract." *Id.* § 455.

³⁸² See the court's discussion of this point in *Behrend v. State*, 55 Ohio App. 2d 135, 140-41, 379 N.E.2d 617 (1977).

³⁸³ 9 Ohio Op.3d 280, 379 N.E.2d 617 (1977).

obtain an accredited degree in architecture.³⁵⁴ In fact, the School of Architecture was reinspected for possible reaccreditation in 1973 and the inspection committee informed the university that it would recommend a two-year accreditation to the NAAB. Shortly, thereafter, however, because of a significant decrease in student enrollment and severe budget constraints, the university decided to phase out the School of Architecture. When the inspection committee learned of this decision, it withdrew its recommendation of accreditation.³⁵⁵ The school continued to function until all presently enrolled students could graduate if they so desired. However, students who graduated could not receive an accredited degree; neither could students who desired to transfer to an accredited school of architecture receive credit for course work completed at Ohio University. On appeal, the court found that there was an implied contract by the institution that the students would be provided accredited academic training, and that the university could not be excused from performance of its contract on the claim of impossibility since the university in choosing to continue other departments in the College of Fine Arts rather than the School of Architecture had created its own impossibility.³⁵⁶ Consequently, the university would be required to respond in damages, which in this case would include, for those students who transferred to another school of architecture, the cost of the additional tuition charged the student to retake course work completed at Ohio University, as well as the lost earnings occasioned during the additional time required to complete the accredited degree. For students who elected to graduate from Ohio University, the damages would include the loss of earnings as a professional architect during the longer apprenticeship that is required of graduates from non-accredited schools of architecture.³⁵⁷

The case suggests that all students who enter a particular department of study should be given the opportunity to complete the degree sought and that courts will find an implied contractual obligation on the university's part to maintain accredited programs. This raises particular problems for a college or university that is confronted by demands from an accrediting association that it make certain changes or increase expenditures for a particular college or department in order to maintain accreditation, since the *Behrend* case would require the university to exert a good faith effort to do so.

³⁵⁴ *Id.* at 281, 379 N.E.2d at 618.

³⁵⁵ *Id.* 379 N.E.2d at 619.

³⁵⁶ *Id.* at 283, 379 N.E.2d at 621.

³⁵⁷ *Id.*

Failing to maintain accreditation would involve the financially troubled university in greater difficulties.

Apparently, however, if the university can make provision for the students to transfer to another program and to receive credit for work completed, the contract would be breached, but the damages would be negligible. Although it is possible to imagine some situations in which the student would receive the benefit of his bargain only if the college or university were required to continue an unprofitable program,³⁰⁰ such specific performance is an extraordinary remedy and it is unlikely that courts would interfere in academic decision-making in this manner.³⁰¹

The Public

In discussing the public interest in the continuation of particular programs or institutions of higher education, it is necessary, once again, to distinguish between state-supported public institutions and private colleges or universities. While a particular community or constituency may have a generalized "interest" in a program's continuation, this interest is not necessarily legally enforceable. In the case of a public university, the board of trustees or the state coordinating boards are presumed to represent the interest of the general public,³⁰² and a member of the general public would have no standing to challenge the decision of the trustees or the coordinating board to terminate a program.³⁰³ The appropriate forum for contesting such decisions might be political, through appeal to the legislative or state executive officers whose budget decisions necessitated retrenchment.

³⁰⁰ In *Eden v. Board of Trustees*, 49 App. Div. 2d 277, 374 N.Y.S.2d 686 (1975), the court employed an estoppel theory in requiring the State University of New York to open a School of Podiatric Medicine as scheduled. The University had solicited applications from students throughout the country and had informed successful applicants that "'all contingencies' as to their acceptance by the school 'were removed'." *Id.* at 278, 374 N.Y.S.2d at 688. The court found that the applicants declining matriculation in other schools of podiatry constituted justifiable reliance upon the University's representations and held that "[t]here cannot be a clearer case for estoppel . . ." *Id.* at 283, 374 N.Y.S.2d at 691-92.

³⁰¹ 55 Ohio App. 2d 135, 379 N.E.3d 617 (1977); *Zehner v. Alexander*, 3 Franklin County Legal J. 27 (C.P., Franklin County, Pa., filed May 26, 1979) (Franklin County Common Pleas Court held that current and prospective students at Wilson College had no standing to bring suit enjoining the Board of Trustees from closing the college).

³⁰² See discussion of state coordinating boards in text accompanying notes 53-56 *supra*.

³⁰³ A suit for the enforcement of a charitable trust cannot be maintained by persons who have no special interest in the enforcement of the trust. The mere fact that as members of the public they benefit from the enforcement of the trust is not sufficient ground to entitle them to sue, since a suit on their behalf can be maintained by the Attorney General.

RESTATEMENT (SECOND) OF TRUSTS § 391 (1957).

With respect to private educational institutions, the public interest in the continuation of an institution or a program is generally represented by the state's attorney general. Typically, private schools are established by charter for educational rather than profit-making purposes and as such are treated as charitable trusts.³⁶² Because of the special status, including preferential tax status,³⁶³ accorded charitable institutions, the state attorney general is typically empowered to intervene on behalf of the public to assure that the charitable purposes of the institution are effectuated.³⁶⁴ As a general rule, similar standing is not accorded to other interested parties, such as donors who have contributed funds to the college, for either general educational purposes or for the establishment of particular programs within the college.³⁶⁵

Hence, a private college is not powerless to terminate programs or even to close its doors entirely if financial consideration, require these actions. If it becomes impossible for the original purpose to be effectuated, the assets of the college or funds designated for a specific program may be diverted to another purpose under the *cy pres* doctrine.³⁶⁶ The authority of the trustees, however, is limited by the charter, and actions not in furtherance of the charter purpose will be deemed to be outside the scope of their authority. Consequently, before diverting funds to another use or before terminating an en-

³⁶² See, e.g., *Ettlinger v. Trustees of Randolph-Macon College*, 31 F.2d 869 (4th Cir. 1929); *Southern Methodist Univ. v. Clayton*, 142 Tex. 179, 176 S.W.2d 749 (1943).

³⁶³ For a comprehensive discussion of the tax status of private colleges and the history of preferential treatment, see Moran, *Private Colleges: The Federal Tax System and Its Impact*, 8 U. Tol. L. Rev. 669 (1977).

³⁶⁴ See note 109 *supra*.

³⁶⁵ But see *Zehner v. Alexander*, 3 Franklin County Legal J. 27 (C.P., Franklin County, Pa., filed May 26, 1979). The Restatement of Trusts states that a donor lacks sufficient interest to enforce the trust once he parts with his gift, and there are numerous decisions to this effect. RESTATEMENT (SECOND) OF TRUSTS § 391, Comment e. (1957); *Holden Hosp. Corp. v. Southern Ill. Hosp. Corp.*, 22 Ill. 2d 150, 174 N.E.2d 793 (1961).

³⁶⁶ *Cy pres* is:

... the doctrine that equity will, when a charity is originally or later becomes impossible, inexpedient, or impracticable of fulfillment, substitute another charitable object which is believed to approach the original purpose as closely as possible. It is the theory that equity has the power to revise a charitable trust where the settlor had a general charitable intent in order to meet unexpected emergencies and changes in conditions which threaten its existence. BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 431 (rev. 2d ed. 1977). In order for the *cy pres* doctrine to be applied, three conditions must be met. First, the court must determine that a valid charitable trust was created; second, the original purpose of the trust must have become impossible or impractical to carry out, and third, the court must determine whether the donor had a general charitable intent in creating the trust. See Annot., 67 A.L.R. 3d 390, 397-99 (1975).

dowed program, the trustees must seek court approval.³⁸⁷ In making such a petition, the college should be prepared to demonstrate the financial situation that justified termination of the program, the way in which this decision fits in with the institution's overall educational mission, and the extent to which the proposed alternate use of funds is similar in purpose to the original goal.³⁸⁸

CONCLUSION

Because of predictable changes in the college-age population throughout the next decade, colleges and universities will be faced with the necessity of restructuring or reducing their educational programs. In confronting the retrenchment issues, the uppermost principle in the minds of university administration and trustees need not be the avoidance of law suits. Instead the focus ought to be on the educational objective to be achieved. Despite the increasing number of law suits against educational institutions, the courts continue to recognize the sovereignty of university officials in making academic decisions and will uphold institutions that take steps in a reasonable manner to achieve educational goals.

Rather than allow restructuring or retrenchment to happen "by chance," institutions should now formulate and adopt retrenchment plans that include: a re-examination and articulation of the school's unique mission, an inquiry into the effect of planned reduction on each of the university's constituencies, and consultation with legal counsel to establish procedures to accomplish the educational objectives, taking into account the legal constraints imposed by substantive and procedural rights of each constituency.

³⁸⁷ See discussion of *cy pres* doctrine at note 266 *supra*. The court in *Wilson College* discussed the permissible bounds of trustee action in this respect. While the trustees might appropriately pass a resolution that the college is in a state of financial exigency necessitating its closing, the trustees may not without court approval take any steps to implement this resolution.

The mere publication of the resolution may cause irreparable harm to the institution by creating a climate that makes it impossible or exceedingly more difficult to preserve the college in the event that the court would reject the trustees' conclusion. Consequently, publication by itself might be outside the scope of the trustees' authority and deprive the court of its full scope of decision-making.

³⁸⁸ See discussion of proof required to show "financial exigency" in text accompanying notes 16-22 *supra*.



Evaluating and Discontinuing Programs

Edward A. Dougherty

Faculty and administrators in higher education have grown increasingly aware of the threats to quality and flexibility in their institutions—for example, the threat of shrinking state support for higher education. They are also aware of a certain “chilling effect” on quality and flexibility resulting from an anticipated decline in enrollment; with such a decline, they envision fewer new programs, fewer new faculty positions, and less revenue available from student fees and enrollment-sensitive funding patterns from public and private sources. Increases in programs for older learners and minorities may offset the overall population trend, and a higher proportion of the population may attend and be retained by institutions of higher learning; but, at best, these offsetting factors will only ease the decline, not reverse it.

Another apparent threat to the quality and flexibility of higher education is the low level of faculty turnover. Because the faculty hired at a rapid rate in the 1950s and 1960s are largely

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middle-aged, few retirements can be expected during the next five to ten years. Coupled with a tightening of enrollment, the overall result is a decrease in positions for young faculty members, who have traditionally been a source of new ideas that enhance the quality of our institutions.

Inflation also robs higher education in a pervasive and devastating way. Faculty salaries are declining in real-dollar buying power, and more money has to go to pay the electric and telephone bills instead of going into teaching and research. High inflation rates affect all areas of operation, but they affect some areas more severely than others, and the teaching and research support seem to be the most likely areas to come up short when the bottom line is totaled.

All these factors—shrinking support, anticipated enrollment decline, low levels of faculty turnover, and inflation—force faculty and administrators to look for new mechanisms that can help maintain or improve quality and flexibility. They know that an institution of higher education cannot stand still. New areas of intellectual interest will arise that ought to be incorporated into the teaching and research programs of the colleges and universities. Students will want to be taught new subjects and develop new skills. Government and industry will place new demands on the institutions of higher learning for research and service. Furthermore, faculty and administrators want to take a more aggressive stand in shaping the future and not just wait to react to a crisis as it may arise.

Assuming that everything possible is being done to stimulate external support for higher education, the only alternative for maintaining or increasing quality and flexibility in higher education is to look at the internal operation of the institutions. Bowen and Douglass (1971) and the Carnegie Commission on Higher Education (1972), among others, have suggested a number of changes that can be made to increase the overall efficiency of institutions; and in the last two recessions (1974–75 and 1979–80), a number of these suggestions were implemented. But the problems facing higher education in the 1980s require more than simply increasing efficiency. If quality and flexibility are to be maintained or increased in the face of declining resources, then institutions must begin to think about how to reduce the scope of their offerings.

Colleges and universities in the future are likely to be smaller and leaner. The challenge to faculty and administrators will be one of maintaining or increasing quality and flexibility as the overall scope of programs is reduced.

Two basic alternatives exist for reducing the scope of institutions of higher education: cuts can be made across the board, or they can be made programmatically. This chapter focuses on the strategies available to reduce resources programmatically, rather than across the board, because, in my view, only academic program discontinuance can help institutions deal with long-term financial difficulty.

Those who favor across-the-board cuts argue that such cuts are more equitable solutions to financial difficulties. The problems they create in the long run, however, are immense. First, such a solution assumes that the institution began with an equitable distribution of funds to programs, so that all cuts should affect programs equally. Even if such a perfect distribution did exist, the demand for teaching, research, and service is constantly changing, and across-the-board cuts do not give the institution the flexibility to meet these changing needs. Second, some programs are better able to absorb cuts than others. For example, programs with more endowment and programs with a high volume of research allow for the transfer of some faculty salary lines to research programs. Third, this kind of contraction will discourage the best and the brightest faculty from pursuing their work at a declining institution, and those who remain will begin to settle for mediocrity out of frustration (Cyert, 1978). Finally, at the program level, cutting across the board results in a decline in initiative because program leaders know that there is no hope of starting anything new, and, even if there were, the new programs are more likely to get cut than the established ones in the next round of cuts.

Another form of cutting programs across the board is to reduce them by attrition. Proponents of this position argue that this process operates as a form of natural selection. The problem with this argument is that the reduction of programs by attrition in no way corresponds to the demand for a program from students or those in need of research or service. Cuts by attrition are completely dependent on the randomness of retirements and the mobility of

faculty. In fact, if one assumes that the higher-quality faculty are the most likely to leave, then reduction by attrition will affect the best programs most negatively. In addition to its uneven effect, the process of reducing programs by attrition is not usually rapid enough to produce significant relief from financial distress, even in the long run, because program directors will simply wait for more prosperous times to make the case for replacing those faculty who were lost in leaner years.

The argument for academic program discontinuance cannot be made on the grounds that it will help in the short run. There is a curious paradoxical relationship between program discontinuance and short-term financial crisis—paradoxical because program discontinuance would probably never receive serious consideration by faculty or administrators without some short-term crisis to stimulate thinking about it. Some sense of urgency, usually financial, is needed to get program discontinuance moving; yet program discontinuance itself is not likely to help an institution through its immediate, short-term crisis (Dougherty, 1979). Often, a financial crisis becomes apparent in the middle of an academic year, and the shortfall needs to be made up by the end of the year. In 1980–81 public institutions in Michigan found that they had to operate on 95 percent of *last* year's budget—after they had budgeted salary increases and set tuition levels based on an anticipated 10 to 12 percent increase. Because the governor has to end each year with a balanced budget, further midyear cuts can come—all of which have to be made up by the end of the fiscal year. Numerous short-term procedures have been set in motion to make up that deficit, but no one believes that the discontinuance of academic programs can be implemented quickly enough to help. At the same time, program discontinuance is discussed widely, and specific proposals have been made to eliminate some academic programs. But such discontinuance will be a response to longer-term problems, not short-term problems—a distinction not always recognized by faculty.

Academic discontinuance is a helpful mechanism for achieving long-term goals and should be viewed as part of a process of setting institutional priorities. It is a tool of long-range planning and priority setting. In order to set institutional priorities, several things are needed: (1) a mechanism for reviewing programs,

(2) agreed-upon criteria for evaluation and priority setting, (3) an organizational structure that will allow for program discontinuance and priority setting, (4) an understanding of the mission of the institution, and (5) adequate leadership that is willing to make decisions about what will go and what will stay. Before we turn to a discussion of the variety of procedures available under each of these headings, let us look at some of the barriers to discontinuance and some definitional problems.

Barriers to Program Discontinuance

Why do faculty and administrators find it so hard to discontinue an academic program? They often recognize the need to close programs in order to maintain or improve the quality of remaining programs and increase the flexibility of the institution to respond to new demands, but they find it very difficult to make the cuts. They are willing to tell junior colleagues that they cannot get tenure, but they are unwilling to close entire programs, even if doing so does *not* involve the release of tenured faculty. There are both psychological and practical reasons for this unwillingness.

First, as Michael (1968) points out, society is not prepared for decline. American society in general and academic society in particular find it very difficult to deal with issues of decline. After centuries of expansion, Americans have been socialized to expect growth. Contraction is equivalent to defeat and death.

Second, institutions are built to survive and to outlast the coming and going of individual bureaucrats (Deleon, 1978); they survive by adapting to new problems through addition rather than subtraction.

Third, organizations develop a certain "ideological inertia" (Cameron, 1978) that tends to support the status quo, existing policies, and programs already in place.

Fourth, significant political groups—including participants in the threatened program and those who have benefited from the teaching, research, or service of the program—will oppose the termination of academic programs (Deleon, 1978).

Fifth, there are legal and moral obstacles to discontinuance. Rood (1977) has outlined some of the legal problems, especially when programs are closed for reasons of "financial exigency." He

points out that the courts have not clarified the meaning of the term and urges institutions to develop their own understanding of how and when programs must be closed, rather than allowing the courts to do it for them. Furniss (1977) and Brown (1976) have discussed the American Association of University Professors' regulations relating to program discontinuance. Although these regulations do not have legally binding authority, they do represent important moral principles of academic freedom and tenure that cannot be ignored. There are two problems, however, with the AAUP regulations. First, they try to separate financial and educational considerations in an unrealistic way. No educational decision can be made today without financial consideration. Second, the AAUP guidelines place the burden of initiation for program discontinuance on faculty. While faculty must be involved in every phase of the discontinuance process, they do not generally discontinue programs. The legal and moral aspects of discontinuance are important to take into account but should not prevent institutions from implementing priority decisions. (See Chapters Nine and Ten for further discussion.)

Finally, as Deleon (1978) points out, no one wants to admit being wrong in starting and continuing a program; therefore, policy makers will look for alternatives to deal with the problem. Policy makers also fear that discontinuing an academic program will do serious damage to the prestige and morale of an institution. These costs must be weighed against the long-term benefit that can come to an institution through enhancing the quality of remaining programs and increasing institutional flexibility to respond to new demands.

Definitional Problems

There are two major problems of definition: What do we mean by "discontinuance" and what do we mean by "program"?

Defining "Discontinuance." For the most part, discontinuance is a process that takes a time frame of nine to twelve months, or longer. A typical pattern is illustrated by the University of Michigan's discontinuance of its population-planning program. In the summer of 1976, an external review of the program was conducted.

The results of the review were considered by the dean and the executive committee of the School of Public Health, in which the program resided. They recommended discontinuance in the winter of 1976-77 and began a lengthy process of consultations with program faculty and others in the School of Public Health. The vice-president for academic affairs also held open forums and met with both internal and external groups during the winter term. The regents of the university finally took action in April of 1977, agreeing to begin the actual process of closing the program. During the next academic year, the nontenured faculty were given notice and arrangements were made for tenured faculty to locate in other units. Safeguards were built in to allow students to finish their work, and some teaching and research were continued on a much reduced basis. Several of the tenured faculty in the program left the university, and, combined with the savings from release of nontenured faculty, the school saved about \$200,000 annually, or approximately 5 percent of its general-fund salary budget. This savings was realized only three or four years after the time the program was originally reviewed.

Discontinuance can also be defined as the "normal" process of shifting academic resources over a more extended period of time. Many faculty and administrators would not consider this process "discontinuance" at all, and at a place like Michigan, which has formal discontinuance guidelines, such shifting would not normally fall within the guidelines. This process simply involves the decision of a dean or department head not to replace a faculty member in a given area and to reduce the course offerings accordingly. Over a period of five to ten years, the faculty are reduced to the point that the program fades from view. This process is mentioned here because it may be important not to interfere with this ongoing process of change as an institution develops more formal guidelines for program discontinuance.

The normal process of shifting resources may not be rapid enough or self-conscious enough to meet the needs of institutions of higher education in the 1980s. In using program discontinuance as a mechanism for implementing long-range plans and priorities, policy makers may wish to narrow the time frame, so that both internal and external constituencies become aware of the institu-

tional priorities and see the visible effects of the implementation of those priorities. An ideal case might be written that includes identification of a well-defined sense of mission, the development of operational objectives, and identification of program priorities. Program cuts would then be made to implement these priority decisions. Ideally, the process should be ongoing, and program discontinuance should be viewed as an investment in the future rather than as a one-time penalty for an overdrawn account. Just as industry is constantly eliminating unprofitable lines so that it can more fully develop profitable ones, so higher education should continuously consider discontinuance of low-priority areas in order to strengthen high-priority areas (Cyert, 1978).

Defining "Program." To protect against arbitrary decisions during the painful process of discontinuance, one needs to specify mechanisms for review, criteria for evaluation, and safeguards for faculty and students. The problem with developing such formal procedural guidelines is that they may be interpreted to protect vested interests, so that no change ever takes place. A clear definition of what programs fall under a formal set of discontinuance guidelines is needed to make them usable.

The University of Michigan guidelines on program discontinuance have an intentional vagueness about what should fall under the university's purview, leaving the question of program definition up to the individual schools and colleges. If the dean or the executive committee feels that formal discontinuance guidelines should be followed in the phasing out of a program, such a recommendation will be brought to the vice-president and the governing board for consideration. The advantage of this system is its flexibility, but the problem is that no one is sure when the guidelines apply and when they do not. Consequently, few programs have been brought forward for consideration.

One alternative to this intentional vagueness is to define programs by exclusion rather than inclusion. One can maintain the desired flexibility and yet clear up some of the uncertainty of what should fall under a set of discontinuance guidelines. In this process of definition by exclusion, only programs that cannot be handled under a normal process of curricular revision come under the formal discontinuance guidelines.

Program Review Procedures

The details of program review have been written about extensively in the last several years—for example, in the *New Directions for Program Evaluation* series (Jossey-Bass) and the *Evaluation Studies Review Annual* (Sage, 1976–1980). Some of the issues discussed in these volumes are particularly relevant to program discontinuance. Choices made about the review process are especially important because the review document will be the primary point of reference when decisions are made about the continuation or discontinuation of a program. On the basis of the review document, faculty and administrators will make priority decisions that will shape the future of the college or university. If that document has been carefully assembled through a fair and equitable process that allows all interested parties to be heard, then the decision to close a program can be justified and completed even in the face of strong antitermination opposition. Without an adequate review process and document, the whole prospect of discontinuance will be jeopardized. Following are a number of questions that need to be addressed by policy makers as they begin to think about reviewing programs for possible discontinuance.

1. What type of evaluation should be done? Dressel (1976) identifies four major types of program evaluation: (1) evaluation of needs in the broader society, for the purpose of developing new programs; (2) evaluation of resources used to attain program goals; (3) evaluation of the results of past decisions; and (4) evaluation of a program's attainment of specific goals. In evaluating programs for possible discontinuance, one should include elements of all four types of evaluations. For example, when the School of Criminology was eliminated at the University of California at Berkeley, it was reviewed from the point of view of (1) the broader social context and the need for people trained in criminology; (2) the use of financial and human resources; (3) the instructional, research, and service decisions made by the school; and (4) the number of graduates, research reports, and service activities of the school.

2. Where does the initiative for program review rest? Virtually everyone claims authority for program review: the faculty, the department, the college, the governing board, the coor-

minating agency, the accreditation agency, and sometimes even the state legislature. In any event, the responsibility for initiating a review should be clearly understood at the outset. Only then can rational planning take place. At many institutions the graduate dean is responsible for conducting reviews. This was the case at Berkeley in the review of the School of Criminology; after the graduate school committee began its review, it was asked to look at the undergraduate programs in criminology as well. However, such cooperation between those with responsibility for reviewing graduate and undergraduate programs may not always prevail. For example, two separate review procedures were set up at the Riverside campus of the University of California. At the University of Michigan, the responsibility for review rests with the deans of the various schools and colleges and with the academic vice-president. Reviews done at Michigan are usually timed to correspond with the ending of a term appointment of a department head or dean, providing the administration with the opportunity to make personnel changes if warranted by the outcome of the review. Such personnel changes may be viewed as an alternative to discontinuance.

The question of authority becomes more complex if agencies outside the institution claim authority for program review. For example, the Regents of the University of the State of New York claimed authority to review and "deregister" doctoral programs. The Albany campus took the regents to court when they recommended deregistration of doctoral programs in history and English at Albany. The campus representatives felt that these programs were essential to the core of the university; the courts, however, decided that the regents did have authority to register and deregister programs, and the graduate components of history and English were discontinued. The Albany situation points out the importance of clarifying the question of responsibility for program review. Most campuses and state agencies have informal understandings about who will review programs, but as questions of discontinuance become more central to the life of higher education, these informal agreements may be challenged and more formal procedures may have to be adopted.

3. What programs should be reviewed? Policy makers considering program discontinuance can find themselves caught be-

tween a desire to review a few programs comprehensively and a desire to compare the quality of all programs at once. Berdahl (1975a) points out the value of selecting a few programs that can be evaluated in depth, so that faculty will not criticize the reviews as superficial. On the other hand, policy makers who feel the need to make priority decisions on the basis of comparable data will argue for a review of all programs. The state of Washington's Council for Postsecondary Education, for example, reviewed all Ph.D. programs in the state to identify duplicate programs and programs with low degree productivity. Once these programs were identified, they were further evaluated on the basis of largely quantitative criteria. This procedure allowed for comparable information to be gathered about this subset of Ph.D. programs, and some programs were eliminated as a result. Other state agencies, such as those in Florida, Louisiana, and New York, have reviewed all programs in a given field, such as nursing, at the same time, allowing for a somewhat more in-depth evaluation without sacrificing comparability.

State coordinating and governing boards are particularly anxious to make priority decisions and, hence, to compare programs on some equitable basis. Faculty and institutional administrators are more concerned with assessing the quality of individual programs and making judgments on the merits of each case. Such considerations may determine what programs should be reviewed. A combination of both approaches is possible. For example, indicators—such as student credit hours produced or the number of degrees granted—may be used to select programs for more thorough reviews, or all programs in similar areas can be reviewed on a regular schedule. In order for a college or university to make priority decisions, it must have some baseline for comparing program quality. Even if decisions about program discontinuance are to be made on a program-by-program basis, there must be some basis for making judgments about quality, and each institution will have to develop its own standards for deciding what programs will be reviewed.

4. What methods of evaluation are most appropriate? Gardner (1977) discusses five evaluation frameworks for higher education: (1) evaluation as professional judgment, rendering expert judgment about the quality, effectiveness, or efficiency of a

program; (2) evaluation as measurement, using some formalized instrument for measuring the results, effects, or performance of a program; (3) evaluation as congruence between performance and objectives, comparing specified goals or objectives with data about the program performance; (4) evaluation oriented toward decision making, providing feedback about the effects of previously made decisions; and (5) goal-free evaluation, judging effect without considering previously stated goals. Each of these methods has strengths and weaknesses. For example, the first and last may be too subjective, while the middle three may be too rigid and too narrowly focused for use in program discontinuance; yet elements of all methods may be helpful to decision makers.

Faculty and administrators in institutions of higher education have by and large looked for experts in the field to render peer judgment about the quality of a program. The experts will, presumably, look at measurable factors and trends in the program, such as student credit-hour production or faculty research activity, but the most important thing that the experts bring to the evaluation task is their judgment about what is important and what is trivial in the field under question. They are able to ask whether the faculty in the program are teaching the right subjects and pursuing the right research questions. The responses to such questions undoubtedly will be subjective, but many believe that the pooled wisdom of those in the field is the best source of information about the quality of a program.

The further removed the review is from the experts in the field, the more one must depend on factual, measurable data, and the more one will be subject to criticism from faculty. The Washington Council for Postsecondary Education was criticized by faculty at the University of Washington, for example, for its dependence on strictly measurable factors in making judgments about programs. Barak and Berdahl (1978), dealing with state-level reviews, point out that state coordinating and governing agencies may depend on internal staff studies and accreditation self-studies but also will use outside consultants in making decisions about programs.

Need for Timeliness. The Council for Postsecondary Education in Washington was criticized not only for its dependence on quantitative methods of evaluation but also for taking nearly three years to complete its review of Ph.D. programs. By the time the

staff made recommendations to the council, either the institutions had already made significant changes or circumstances had changed substantially. There are, undoubtedly, examples from individual institutions of equally protracted reviews. The State University of New York at Albany was able to do timely reviews and determine what programs to cut in a very short time (two to three months) because it already had in place a series of individual program evaluations that had been prepared over the previous seven years. Without those more thorough reviews in place, Albany could not have done the job so quickly.

Need for Adequate Financial Analysis. In addition to timeliness, policy makers thinking about program discontinuance should also consider the importance of adequate financial analysis. They need to look not only at gross savings realized by closing a program but also at costs incurred by such things as possible retraining of faculty, "buying out" faculty with early-retirement options, unemployment compensation, law suits, and lost income from research grants and student fees. For example, the University of Pennsylvania did a significant amount of financial analysis in considering the discontinuance of its School of Allied Medical Professions. Analysts concluded that the closure would save money for the university only if the tuition revenue lost by closing the school was made up for in other schools or colleges. A similar conclusion was reached at the University of Michigan when it decided to discontinue its population-planning program. Analysts found that savings could be realized only if the lost enrollments in the discontinued program were made up by other programs in the School of Public Health without increases in their faculties. Thus, the savings did not come immediately but only as the process of discontinuance was completed three to four years later.

Degree of Faculty Participation. One of the most difficult problems facing policy makers considering discontinuance is the degree of faculty participation in the process. On the one hand, the administration does not want to imply that faculty input should be sidestepped; on the other hand, there is a danger of being "due processed" to death. As Behn (1980) points out, one of the differences between business and public agencies is that the businessman can make a decision and then bring everyone in on it, whereas the government bureaucrat finds that everyone has an

opinion and wants to have an input before the decision is made. Higher education is on the same side of this dilemma as government; in fact, it may be even more prone to bringing everyone in on the act, because it is largely staffed by faculty who view themselves as experts and as highly independent entrepreneurs.

The problem of faculty participation is especially difficult in larger schools and colleges, where it is not possible to include everyone in the evaluation process. While faculty may be given the authority to shape the curriculum, they cannot exercise that authority except as departmental units, and departmental units are not likely to vote themselves out of existence. One possible solution to this problem is to have the governing faculty elect a smaller body to represent them in matters of discontinuance. Either an existing body, such as a college executive committee or curriculum committee, or a newly created body could act for the faculty.

Criteria for Evaluation

Just as there are numerous review methodologies to choose from when one is considering program discontinuance, so there are a great many criteria for evaluating programs and making priority decisions. Policy makers must decide on the combination of methods and criteria most appropriate for their situation.

Clark (1979) and the Educational Testing Service have devised a system for evaluating graduate programs that combines numerical rankings and quality criteria. According to Clark, graduate students and faculty can use this system to make reliable judgments concerning program quality. Measures of faculty quality are based on quality of teaching, as rated by students; average number of articles and book reviews published by faculty over the last three years; and amount of research being conducted by faculty members. Other measures used to determine the overall quality of a graduate program include the quality of students in the program, the "humaneness" of the environment within the department, the resources available to students and faculty, and the performance of program alumni. In addition, the review system looks at the clarity of program objectives, course and program offerings, admissions policies, and a variety of other operational procedures. While the

system depends largely on peer rating of these factors, it does have the advantage of giving a comprehensive, multidimensional analysis of program quality.

Colleges and universities often evaluate many of the factors mentioned above in a less formal way. Typically, an evaluation will begin with a self-study (initiated as a part of reaccreditation) or a study by an internal review committee that will look at the historical background of the program, the demonstrated need it is serving, curriculum, students, faculty, finances, facilities, and support services. These internal reports can become a source of acrimony if decision makers decide to use them as a basis for discontinuance. The only way to avoid this result is to agree at the outset what criteria will be used and how they will be evaluated. Faculty and administrators, for example, could agree that a program will be judged on the basis of (1) centrality of the program to the mission of the university; (2) overall quality of faculty and curriculum; and (3) extent of future demand for students, research, and service in the area (see Chapter Four). They could also agree that available factual data will be collected and that a team of outside evaluators made up of peers in the field will make judgments about these three concerns. If these agreements can be reached, then an effective review can be conducted.

For several reasons, a college may decide to use a small number of overarching criteria rather than an infinite number of specific criteria. First, the three major issues that seem to recur in discussions of discontinuance are centrality, quality, and social demands. Second, these more general criteria can be elaborated on by the review committee to fit the circumstances of the individual program. Third, many faculty react negatively to long lists of criteria, especially if they have not had a hand in developing them. In any event, a clear statement of the criteria to be used in making discontinuance decisions will greatly facilitate the process of actually closing a program.

Institutional Missions

In times of retrenchment, institutional mission becomes increasingly important because it can provide the basis on which

decisions are made about what stays and what goes. Alfred (1978, p. vii) asks, "Should [the institution] attempt to become 'all things to all people,' as in the growth years of the 1960s, or should it concentrate on doing well things that it does best and avoid getting into areas not central to its mission?" An institution that does not know what is central to its mission will eventually find itself stretched in too many directions, which can result in financial problems. When policy makers decide that it is time to cut programs to help the financial situation, they will not know what to cut without a clear understanding of institutional mission.

Defining mission can be a difficult task and can result in generalized statements that are open to various interpretations. In order for a mission statement to have meaning, it needs a certain degree of operational specificity. This specificity can take a number of forms. For example, an institution can specify the program areas or program levels it will include. One institution may emphasize vocational preparation, another may stress the liberal arts, and yet another may focus on professional education or graduate training and research. Some institutions may focus on lower-level education; others may focus on upper-level education; others may decide to eliminate undergraduate education altogether and focus on graduate and professional education and research. Specificity in institutional mission can also come in the form of qualitative definitions. An institution can define itself as offering programs to specific levels of students—some appealing to the very bright, others to the average student, and still others to the educationally disadvantaged. At Berkeley, for example, the professional schools defined their mission in terms of quality, while the School of Criminology was interested primarily in expanded access for minorities and women. The disparity in mission between the school and the campus was one of the factors that led to the school's discontinuance.

Specificity of mission can be quantitative as well as qualitative. For example, the University of California at Riverside has set minimum standards for the number of faculty in each of its graduate programs. If the number of faculty falls below the minimum, then a decision is made either to replace the faculty or to discontinue the program. This decision is based not only on num-

bers but on other institutional priorities as well. The quantitative factors do serve, however, as important indicators of the need for further study. Similarly, an institution could use enrollment to trigger further review. For instance, Florida State University discontinued its Engineering Division when student numbers declined in the mid-1970s.

A clear mission with specified objectives enables a college or university to develop priorities for decision-making purposes. On the basis of previous work (Dougherty, 1979), it seems clear that the programs most likely to be discontinued are somehow outside the acceptable range of institutional objectives. When a program no longer contributes to the mission of the institution, it becomes vulnerable. The mission may, in fact, lack clear articulation or may be arbitrarily redefined by administrators to achieve their purpose, but it gains the force of a well-thought-out statement in times of hardship. An institution is much more likely to control its own destiny and decide what it will keep and what it will cast away if it has a clear mission statement with specified objectives. The alternative may be to have an outside agency or the courts decide what that mission should be in order to preserve the financial well-being of the institution.

Leadership Styles

Program discontinuance is seldom initiated by faculty groups; rather, in examples to date program cutbacks have been the result of strong leadership from institutional administrators. These people are usually high-level administrators who are willing to make the hard decisions and convince others that the institution will be better off, in the long run, without the program under question. At SUNY-Albany, for example, cuts were initiated under two different presidents. The first began the process of program review and set up the mechanisms for arranging programs in priority order; as a result, nine programs were eliminated. The next president was the prime mover in speeding up the process of review and decision making necessitated by state budget reductions—a process that led to the closure of twenty more programs. He played a significant role in the process, sharpening the institutional

mission and implementing the planning processes to support that mission. At the University of Washington, a home economics program was closed under the leadership of the dean in the College of Arts and Sciences. After deciding not to continue the program because it was not of high enough priority, he was able to persuade the provost and the president that the college and the institution as a whole were better served by reallocating available funds elsewhere.

Cyert (1978) points out that one of the major leadership tasks under conditions of contraction or of constant size is to maintain the morale of faculty while at the same time providing for the effective utilization of resources. Strong leadership is necessary to assure faculty that discontinuance does not mean decline in quality but may be the only means of assuring quality and flexibility in the face of declining resources. Real leadership will move the institution and its faculty beyond mere survival to a focus on the enhancement of quality among programs that remain.

Conclusion

Program discontinuance may be viewed as nothing more than a solution looking for a problem, but it also may be viewed more positively—as one of several mechanisms that can help maintain or improve the quality and flexibility of an institution in the face of declining resources. Discontinuance should be among the tools available for the implementation of long-range plans developed by faculty and administrators. It allows for the speeding up of the normal process of resource reallocation. Sometimes that process is simply too slow to keep up with the shifting priorities of the institution or the broader society. Sometimes the normal processes of program change are too costly to keep the institution alive and healthy.

Program discontinuance involves significant effort on the part of faculty and administrators, and it will not produce immediate savings in most cases; over the long run, however, the savings can be substantial. The closing of Michigan's population-planning program has produced an annual savings of over \$200,000 for the School of Public Health. SUNY-Albany was able to realize more immediate financial savings to meet the demands

of the state budget cuts, but its methods probably represent an exception to normal practice. In any case, long-term savings can be realized through discontinuance.

The advantages of discontinuance are substantial: the increased resources that become available to the remaining programs and faculty; the clarification of institutional priorities, and the increased flexibility gained to respond to new demands from the academic disciplines and the broader society. The alternative to discontinuance may be prolonged across-the-board cuts, which can result only in the dissipation of quality because scarce resources have gone to programs that are of marginal importance to the institution. Discontinuance is not a panacea for every difficulty. Although some may view it as an easy way out of difficulty, it is never easy and will consume the time and energy of many faculty and administrators, but the long-run gains can produce greater quality and flexibility for the institution.

For Further Reading

Further reading on academic program review, a subject that has gained considerable attention in recent years, should begin with Dressel's (1976) comprehensive *Handbook of Academic Evaluation*. For qualitative review of graduate programs, see Clark, Hartnett, and Baird (1976). The experience of the State University of New York with terminating academic programs is discussed by Fields (1976). For similar essays on academic program review, see Hample (1981) and Craven (1980).

PLANNING THE UNTHINKABLE: ISSUES IN INSTITUTIONAL REORGANIZATION AND FACULTY REDUCTIONS

STEVEN GLENN OLSWANG*

Many institutions of higher education are facing severe budgetary stringencies. The principal causes of these crises are twofold: institutions are academically and financially over-extended due to past unchecked program expansion, and institutional income and appropriations from state legislatures are reduced due to the combination of the general economic downturn and high rate of inflation. Reductions in student populations are affecting enrollment, thus, tuition revenues are declining as well. As a result, colleges and universities need to contract through some form of institutional reorganization.

What form the contraction will take depends upon the extent and suddenness of the funding decrease. Most importantly, the character of the institution, its historical or statutory mission, the degree of involvement its faculty has in institutional governance, and the leadership of the administration, will affect the shape of the reorganization.¹ But in all cases, the central administration ultimately is responsible for implementing the institutional reorganization.

Many issues must be examined before an institutional reorganization can be implemented. Influencing every single issue is the long-term effect on the quality of education offered at the institution. Since the quality of a college or university is a direct reflection of its faculty, personnel issues are paramount if a reorganization, with potential faculty reductions, is to occur. Thus, if institutional quality is to be preserved, faculty reductions, and the forms they take, rights which accrue, and the impact on the principle of academic freedom and on the contract of tenure, must be central in any planning scenario.

* B.A. Northwestern University, 1968; J.D. University of Illinois, 1971; Ph.D. University of Washington, 1977. Assistant Provost for Academic Affairs, University of Washington. Lecturer, Area of Higher Education, College of Education, University of Washington.

¹ See generally J.R. MINGLE AND ASSOCIATES, CHALLENGES OF RETRENCHMENT (1981); NEW DIRECTIONS FOR INSTITUTIONAL RESEARCH: PLANNING RATIONAL RETRENCHMENT NO. 24 (A. Cooke ed. 1979).

When they exist, institutions must follow their own rules in implementing program reductions, program eliminations, or in declaring a financial exigency. However, many institutions have never adopted such rules or, because of impending reductions are in the process of now developing them or reconsidering those they have.² This article discusses some of the personnel issues which must be considered by administrators and faculty in formulating such rules and presents the several perspectives from which each issue must be viewed before decisions can be made. The legal support for the various alternatives is also discussed; yet since many different reorganization forms are legally permissible, decisions on which approach an institution should take must be based primarily on the policy determination of what is most appropriate for that institution.

Presented herein is a three-tiered structure to the planning analysis once a budgetary situation is presented which necessitates reductions in the instructional program and/or faculty. Those tiers are:

- I. Structure of the Institutional Reorganization and Faculty Reduction.
- II. Policy Guidelines for the Identification of Faculty for Removal.
- III. Faculty Rights and Prerogatives in the Event of Removal.

I. STRUCTURE OF THE INSTITUTIONAL REORGANIZATION AND FACULTY REDUCTION

The extent of the budgetary crisis will dictate the gross structure of administrative action. At one extreme in the continuum is the declaration of a financial exigency. As the degree of severity of budget reduction is lessened, other, not so drastic, but more problematic options, such as program and faculty eliminations or reductions, become available. Or, put another way, only when selective reductions and eliminations cannot accomplish the necessary budget cuts within the time frame allowed can a financial exigency be declared.

While institutional definitions of exactly what constitutes a financial exigency vary, it is important to look at the American Association for University Professors' definition of a financial exigency. That definition is: "An imminent financial crisis which threatens the survival of the institution as a whole and cannot be alleviated by less drastic means."³ From an operating perspective this definition is not very useful. Further, it is criticized by some in higher education because of its narrowness.⁴

² College and University Personnel Association, *Tenure and Retrenchment Practices in Higher Education—A Technical Report*, 31 J. Coll. & U. PERSONNEL A. (Fall-Winter 1980).

³ "Recommended Institutional Regulations on Academic Freedom and Tenure," 62 AAUP BULL. 184-91, 186 (Summer 1976) [hereinafter cited as AAUP Recommended Institutional Regulations].

⁴ FURNISS, *The 1976 AAUP Retrenchment Policy*, 57 EDUC. REC. 133-39 (1977).

The courts have been more helpful in defining a financial exigency, in at least a limited way. A financial exigency validly exists when the institutional board declares it does, provided that the financial crisis is bona fide and not used as a pretext for other motivations.

Where there is a showing that the administrative body, in exercising its judgment, acts from honest convictions, based upon the facts which it believes for the best interest of the School, and there is no showing that the acts are arbitrary or generated by ill will, fraud, collusion, or other such motives it is not the province of the court to interfere and substitute its judgment for that of the administrative body.⁵

The several courts which have had to assess whether bona fide financial exigencies existed agree that it is a decision based on an operating budget deficit.⁶ If current or projected expenditures exceed operating revenues (without regard to endowment or capital accounts) a financial exigency could exist.

Normally, financial exigencies are considered to be institution-wide. There is, however, some indication that unit-specific financial exigencies could be declared. In *Scheurer v. Creighton University*,⁷ the Supreme Court of Nebraska approved the action of Creighton to eliminate its College of Pharmacy based on financial reasons, despite arguments that the institution's resources as a whole were not inadequate to support the college. But this program-specific declaration of exigency must be regarded as suspect in the more common situation, particularly in state-funded institutions, where budgets are centrally administered rather than where each college is viewed as self-supporting.

The more appropriate route to effectuate reductions when institutional resources are insufficient to support fully all programs, but the deficit is not so severe as to warrant the drastic action of an institution-wide financial exigency declaration, is through some form of institutional reorganization. Such reorganizations can affect individual units in one of two ways: program eliminations or program reductions.

Program eliminations and program reductions differ in relation to the extent of the cut made. In program eliminations, an entire academic concentration, usually in the form of an entire department or an identifiable academic program within a department, is eliminated from the university. In program reductions, program budgets are not eliminated completely but are partially reduced. Depending upon the educational goals of the institution, both could be viable options.

⁵ *Levitt v. Board of Trustees of the Neb.State Colleges*, 376 F. Supp. 945, 950 (D. Neb. 1974).

⁶ *Krotkoff v. Goucher College*, 585 F.2d 675, 681 (4th Cir. 1978); *AAUP v. Bloomfield College*, 136 N.J. Super. 442, 446, 346 A.2d 615, 617 (1975) *aff'g* 129 N.J. Super. 249, 322 A.2d 846 (1974). See also Note, *The Dismissal of Tenured Faculty for Reasons of Financial Exigency*, 51 IND. L.J. 417, 420-23 (1976).

⁷ 199 Neb. 618, 260 N.W.2d 595 (1977).

The AAUP recognizes the validity of faculty removals as a result of program eliminations, not mandated by financial exigency, but makes no specific reference in its documents to faculty removals due to program reductions. The following policy statement is an example:

Termination of an appointment with continuous tenure, or of a probationary or specified appointment before the end of the specified term, may occur as a result of bona fide formal discontinuance of a program or department of instruction. The following standards or procedures will apply:

- (1) The decision to discontinue formally a program or department of instruction will be based essentially upon educational considerations, as determined primarily by the faculty as a whole or an appropriate committee thereof.
- (2) Before the administration issues notices to a faculty member of its intention to terminate an appointment because of a formal discontinuance of a program or department of instruction, the institution will make every effort to place the faculty member concerned in another suitable unit. . . . If no position is available within the institution, with or without training, the faculty member's appointment may be terminated ⁸

Program eliminations have also been recognized by courts as a permissible mechanism to reorganize an institution even though it results in the removal of tenured faculty. Just as courts have found that the right to remove tenured faculty due to financial emergency is "implicit" in the tenure contract,⁹ so too, is the right to remove due to program elimination implicit in the terms of a tenure agreement.

American courts (citations omitted) and secondary authorities (citations omitted) uniformly recognize that, unless otherwise provided in the agreement of the parties, or in the regulations of the institution, or in a statute, an institution of higher education has an implied contractual right to make in good faith an unavoidable termination of right to the employment of a tenured member of the faculty when his position is being eliminated as part of a change in academic program.¹⁰

And while both the program "change" reasoning as well as the financial exigency theory could support program reductions and resulting faculty removals, no judicial test of such actions has yet clearly arisen.

The most complex question which needs to be resolved at the very outset of any reorganization plan, regardless of the form it takes, is the definition of an academic program. It is simplest to define a program as synonymous with an academic department. However, an academic program might better be equated with a degree program or a major concentration within a degree program.

⁸ AAUP Recommended Institutional Regulations, *supra* note 3, at 187.

⁹ See *Krotkoff v. Goucher College*, 585 F.2d 675, 679 (4th Cir. 1978).

¹⁰ *Jimenez v. Almodovar*, 650 F.2d 363, 368 (1st Cir. 1981).

An example of the complexity of this issue can be seen in the program definitions, "teaching-service areas," utilized in the California State College and University system. While in the past such teaching-service areas were defined as essentially equivalent to departments, a re-evaluation of those definitions is presently ongoing.¹¹ At California State College at Long Beach, the president proposed raising the "teaching-service area" designations from the present number of 60 to over 200. This proposal was vigorously opposed by the faculty at that institution, for the result of such redesignation would allow the administration to identify in much greater specificity the teaching specialties at the institution. Such specificity would allow more precise selection of faculty. Thus, should selective program reductions or eliminations require faculty removals, particular teaching specialties could be singled out without affecting other desired teaching specialties which the governing powers desired to have remain available on campus.

At the University of Washington, where state-mandated budgetary reductions required a declaration of financial emergency, the plan for implementing faculty removals focused on program units. The definition of an academic program, formulated by the faculty senate, is as follows:

An academic program is an area of specialization which has one or more of the following characteristics:

- a. has "program" as part of its title;
- b. grants a degree or credential;
- c. has a sequence of courses with a common prefix;
- d. has been identified as a program by a distinct faculty action.

Ordinarily an academic program shall be smaller than an administrative unit such as a department and larger than the activities of a single faculty member.¹²

Program eliminations, from a planning perspective, are considerably

¹¹ *Bitter Fracas at Long Beach Pits President Against Faculty over Reorganization Plan*, *Chronicle of Higher Education*, August 3, 1981, at 3.

¹² University of Washington, *Policies and Procedures for a Mandatory Reduction in Faculty on Declaration of a Financial Emergency* (October 3, 1981). The University Senate at The Ohio State University adopted the following definition of an academic program on June 7, 1982 as a component of its Rules for Release of Tenured Faculty in Case of Financial Emergency:

"Academic program" or "program" means:

- (a) A college, school, department, division, or instructional unit headed by an academic administrator;
- (b) A research or service unit (which may or may not educate students) headed by an academic administrator;
- (c) A coherent set of courses, or program of study, which leads to an academic degree; or
- (d) A coherent set of courses, or program of study, which does not lead to an academic degree but which serves to educate or train students (e.g., a professional certification program or a remedial program).

easier to accomplish than program reductions. Identification of faculty to be removed by the sweeping action of eliminating an entire program is straight-forward: all faculty in the program are removed. Whereas in a program reduction, a more complete examination of the internal specialties within a program must be made, and faculty must be identified as within one (or more) of those specialties. This latter identification often proves exceedingly difficult, particularly where specialties and subspecialties overlap, and everyone in the department is arguably qualified to teach in all the specialty areas.

Despite the difficulties of assessing faculty program affiliation, the use of program reductions is a viable planning model to consider. It enables the institution to maintain the diversity of its programs even though their staffing levels are reduced. This method would also enable an institution to meet its contractual obligations to students.¹³ The institution must permit students, both graduate and undergraduate, to complete their degree programs without a diminution in its quality or to provide them adequate notice of an impending program elimination to enable them to transfer to another institution.¹⁴ Therefore, even in a program elimination situation, it is necessary for an institution to retain sufficient faculty (at least temporarily) to fulfill this obligation. As a result, in some instances, it may be more logical for institutions to maintain existing programs, even though reduced in size, than to eliminate them entirely.

The underlying premise behind the alternative reorganization scenarios must be kept in mind at all times. That premise is that institutional quality need not be sacrificed to balance a budget. Thus, behind any reorganization geared to economize is the recognition that the goal of the institution, to provide the highest quality education possible, must continue to be met. From an academic planning perspective, selective program eliminations or program reductions enable the institution to be more precise in deciding where expenditures will be reduced and where reductions will be the least destructive to the overall quality of the institution.¹⁵ Reductions through financial exigency procedures, because of their traditional across-the-board, seniority-related nature, create the greatest potential damage to the institution's purpose. Yet the latter alternative is used most often because of the "safety" and ease of its applica-

¹³ For a review of the contractual relationship between the student and the university, see Nordin, *The Contract to Educate: Toward a More Workable Theory of the Student-University Relationship*, 8 J. COLL. & U.L. 141 (1981-1982); Ray, *Toward Contractual Rights for College Students*, 10 J.L. & ED. 163 (1981); Jennings, *Breach of Contract Suits by Students Against Postsecondary Education Institutions: Can They Succeed?*, 7 J. COLL. & U.L. 191 (1980-1981).

¹⁴ Olswang, Cole, and Wilson, *Program Elimination, Financial Emergency, and Student Rights*, 9 J. COLL. & U.L. 163 (1982-1983).

¹⁵ Dougherty, *Should You Starve All Programs Or Eliminate a Few?*, in NEW DIRECTIONS FOR INSTITUTIONAL RESEARCH: COPING WITH FACULTY REDUCTIONS, NO. 30 at 9-24 (S.R. Hample ed. 1981).

tion. However, if the financial crisis is severe enough to warrant the declaration of a financial exigency, the use of program reduction or faculty elimination mechanics can and should still be used. Unless required by existing institutional rules, straight seniority layoffs should not be used in effecting faculty reductions in a financial exigency since they have no relation to program needs and will impair institutional quality.

II. POLICY GUIDELINES FOR THE IDENTIFICATION OF FACULTY FOR REMOVAL.

As discussed in the previous section, three primary alternatives exist to accomplish economies in the university's faculty staffing: financial exigency declarations, program eliminations, and program reductions. Common to all three alternatives is the necessity to construct a prioritized list of programs which are not central to the continued functioning of the institution and thereafter to identify the faculty who are to be removed.

While the prioritization of expendable programs will indicate from where faculty reductions should be made, there also must be developed a system of structures or guidelines for identifying *who* within those areas is to be removed. The issues of tenure, seniority, departmental or university need, faculty performance, and others, must be considered in determining the guidelines to be used in such an identification process. Some of these policy issues are discussed below, along with support for each side of the issue.

1. *Should all tenured faculty within an identified program be retained until all non-tenured faculty within the program are removed?*

Institutional rules regarding the rights accrued under the contract of tenure must be examined to determine whether flexibility exists in the removal of faculty. But generally, the question must be asked: Does the contract of tenure require that faculty with tenure be retained until all non-tenured faculty are released? In order to assess this question, it seems appropriate first to examine the principles of tenure set forth by the American Association of University Professors.

The AAUP defines tenure, in its 1940 Statement, as "a means to certain ends; specifically: 1) freedom of teaching and research and of extramural activities and 2) a sufficient degree of economic security to make the profession attractive to men and women of ability."¹⁶ Yet, at the same time, the AAUP recognizes termination of tenure will be necessary "under extraordinary circumstances because of financial exigencies."¹⁷

¹⁶ *Academic Freedom and Tenure, 1940 Statement of Principles and 1970 Interpretive Comments*, 60 AAUP BULL. 269-72, 270 (Summer 1974).

¹⁷ *Id.*

In the event removals are required because of financial exigency, the AAUP policies state the preference tenured faculty should have over non-tenured. "The appointment of a faculty member with tenure will not be terminated in favor of retaining a faculty member without tenure, except in extraordinary circumstances where a serious distortion of the academic program would otherwise result."¹⁸ Also, "[a]s particular reductions are considered, rights under academic tenure should be protected. The service of a tenured professor should not be terminated in favor of retaining someone without tenure who may at a particular moment seem to be more productive."¹⁹

Thus, the AAUP statements and guidelines reinforce the position that while the institution can remove tenured faculty, the contract of tenure entitles the faculty member to the right to be retained until non-tenured faculty have been released. This preference, however, appears to be limited to identifiable program units only, reinforcing the validity of making specific programmatic reductions.

Despite the AAUP position, equally supportable arguments can be presented as to why preference, even within programs, should not be given to tenured faculty over non-tenured faculty should such removal situations arise. No court has formally stated that tenured faculty must be given preference over non-tenured faculty in such situations. Tenured faculty may be removed for financial reasons. "No case indicates that tenure creates a right to exemption from dismissal for financial reasons."²⁰ In the several cases that have been brought by tenured faculty members objecting to their removal for budgetary reasons, the courts have consistently held that tenure is subject to termination by the institution if the governing body determines that the financial need for doing so is bona fide, made in good faith, and the rules of the institution are followed in effecting the terminations.²¹

Further, the development of the identification criteria under which faculty members are to be selected for removal because of budgetary reasons is left to the administration. In *Krotkoff v. Goucher College*,²² eleven untenured and four tenured faculty were selected for removal. "These professors were selected largely on the basis of the dean's study of enrollment projections and necessary changes in the curriculum."²³ This was found to be a valid procedure. In *Levitt v. Board of Trustees of*

¹⁸ AAUP Recommended Institutional Regulations *supra* note 3, at 187.

¹⁹ On *Institutional Problems Resulting from Financial Exigency: Some Operating Guidelines*, 60 AAUP BULL. 267-68, 267 (Summer 1974) [hereinafter cited as AAUP, *Financial Exigency*].

²⁰ *Krotkoff*, 585 F.2d at 679 n.11.

²¹ For a thorough review of the relevant cases involving financial exigency terminations, see Tucker, *Financial Exigency—Rights, Responsibilities and Recent Decisions*, 2 J. COLL. & U.L. 103 (1974), in conjunction with Wilson, *Financial Exigency: Examination of Recent Cases Involving Layoff of Tenured Faculty*, 4 J. COLL. & U.L. 187 (1977).

²² 585 F.2d 675 (4th Cir. 1978).

²³ *Id.* at 678.

the Nebraska State College, the administration, faced with a legislatively mandated budget reduction, prepared, after consultation with the faculty, a list of criteria upon which faculty members were to be evaluated "in order to verify the judgment made in deciding which faculty members would be terminated."²⁴ Consideration was also given to maintaining "the most necessary programs" and retaining individual faculty "necessary for carrying on these programs."²⁵ Again, the court upheld removals of both tenured and non-tenured faculty under this process.

In *Bignall v. North Idaho College*,²⁶ the court was squarely faced with the question of whether junior faculty could be retained over tenured faculty. Ms. Bignall was notified by the college of her removal after its declaration of a financial exigency. She alleged, among other things, that she was discriminated against because the college did not use proper procedures in selecting her for removal and that "the college retained less senior faculty."²⁷ The court found, however, that the college had formulated guidelines to be applied to the entire fifty person faculty which took into account performance evaluations and the needs of the college. Based on the application of these guidelines,²⁸ the court found her removal to be valid. "While there was some, perhaps unavoidable, flexibility in the selection process, the district court was not clearly erroneous in concluding that the college did not act discriminatorily."²⁹

Reasonable criteria must be used in the identification of faculty members to be removed in the event of reorganization. As long as those criteria are not applied in an arbitrary or capricious manner, or used as a subterfuge to eliminate all tenure rights or punish faculty for permissible exercises of academic freedom, there appears to be no legal barrier to removing tenured faculty while retaining non-tenured faculty. The development of the particularized criteria for such identifications could take several forms, and faculty should be consulted in the process.

But the technical and legal reasons for not distinguishing between tenured and non-tenured faculty do not totally address the policy issue. The practical questions are: Do you retain the "best" faculty in the institution to staff the programs, or do you narrow that choice by first con-

²⁴ 376 F. Supp. 945, 949 (D. Neb. 1974).

²⁵ *Id.*

²⁶ 538 F.2d 243 (9th Cir. 1976).

²⁷ *Id.* at 249-50.

²⁸ The evidence the court identified as supporting Ms. Bignall's removal was as follows:

He [the President of the College] and various administrators, including the two heads of the two departments in which Ms. Bignall taught, all testified that she was the least well qualified academically; that because she directed her instruction to the most gifted among her students, she alienated the less bright so that students regularly transferred out of her classes or tried to avoid her courses.

Id. at 250. Thus, the use of *ad hominem* performance evaluations to identify faculty for removals for budgetary reasons is upheld as a valid process.

²⁹ *Id.* at 250.

centrating on the untenured faculty for removal? What are the consequences to the overall morale of the faculty by not giving priority to tenure in such a selection process?

A strong argument can be made for protecting non-tenured faculty by making them equal to tenured faculty when financial reasons require staff reductions. Both cadres of faculty, tenured and untenured, are generally equal in credentials. While certainly tenured faculty likely have, because of their length of time in the profession, a greater depth of knowledge, the newer untenured faculty have been trained with the most current knowledge. And while some untenured faculty will not attain tenure because their performance is inadequate, so too some tenured faculty have fallen behind in their field, no longer do research, or are poor teachers. All this argues for looking at the individual in making retention decisions, not solely at tenure status.³⁰

There is also the question of faculty morale. If tenured faculty do not feel secure from removal in preference to non-tenured faculty, then tenure, in this context, will lose its meaning. If all faculty are equally to be reviewed for removal, faculty throughout the institution will be fearful and morale will suffer to a greater extent than if tenure was afforded a priority status in such cutbacks. Additionally, it can be argued that not protecting tenure now will lead to an inability to attract new faculty in the future; new faculty will have no reason to work hard for tenure because tenure itself will provide no greater protections. This issue is further infected by the possibility of censure by the AAUP who, as a concerned third party, believes tenure must be given priority.³¹

This morale argument goes both ways. By reducing faculty on the basis of criteria such as need and performance, without regard to tenure status, faculty may view the university as focusing solely on what is best for the institution's future. This would increase faculty morale. Where the institution retains those non-tenured faculty viewed important to the programmatic needs of the institution, and releases tenured faculty who are assessed as less valuable on the basis of their past performance, it will signal that performance is what counts in job retention. Accountability from such a policy will be clear. As a result, recruitment of future faculty would be enhanced, as good, new Ph.D.'s would be attracted to an institution which has stated that if they perform well, they will be retained.

2. *Should length of service to the institution be a basis for identifying faculty for removal?*

Assuming the policy decision is made that tenure is to be afforded preference in the event of removals for reorganization or financial ex-

³⁰ See generally, Olswang & Fantel, *Tenure and Periodic Performance Review: Compatible Legal and Administrative Principles*, 7 J. COLL. & U.L. 1 (1980-1981); O'Toole, *A Conscientious Objection, TENURE* (1979); Chait & Ford, *BEYOND TRADITIONAL TENURE*, (1982).

³¹ See *supra* text accompanying notes 18 and 19.

agency, then the question of seniority within professional ranks must be addressed. If, in an identifiable program, there are non-tenured assistant professors, and tenured associate and full professors, should seniority within categories be a controlling factor in removal processes? On the other hand, if seniority is not used as a classifier, other guidelines, such as departmental program needs and faculty strengths will have to be identified and used.

This issues comes most sharply into focus when decisions are made to reduce a unit to accomplish a more limited but distinct programmatic goal, since fewer faculty will be necessary to conduct the program desired. For example, if the unit is to eliminate two faculty members, and there are three assistant professors, should the two least senior be removed? Or, if that unit is to eliminate five faculty members, upon what criteria are the two tenured faculty members to be selected after the three assistant professors are removed?

The argument for using seniority is straight-forward. Those who have been at the institution longest have the greatest commitment to the program, and therefore should be the last removed. Additionally, it can be argued that younger faculty with less time invested in the university are also the most mobile. They usually have lower salaries, and likely will find it less difficult to find jobs elsewhere. Seniority is also the easiest system to apply, and the easiest to defend on the basis of equal treatment. Simply add up the number of years service to the university, and the faculty with the least seniority are identified.

However, very reasoned arguments are present for not using seniority. The strongest argument is the impact on the academic program. If a program is to be retained at a reduced size, then it is the quality of the program which must be of primary importance. To protect the program the faculty who are best able to offer that program should be the ones retained. It is possible that there will be no correlation between seniority and faculty quality. To follow a stringent "last in - first out" policy, even within categories of non-tenured/tenured, will potentially reduce the institution's ability to maintain a high quality program. But most importantly, straight seniority seems contrary to the merit principle long embraced by higher education institutions.

3. *Should the academic needs of an identifiable program be used as a criterion in identifying faculty for removal?*

If seniority is not to be accepted as a policy guideline, then a guideline requiring the use of other criteria must be adopted. This is necessary even if tenure is to be a protected category. One such criterion is staffing needs.

The use of program needs in deciding staffing decisions raises serious questions. To determine which faculty are best able to meet the

program's needs, evaluations of faculty performance are required. Do such evaluations transform an educational reorganization process into an incompetence removal process? "It is deceptively easy to argue that retrenchment decisions should take into account the relatively superior performance of one faculty member as opposed to another. But the issue of evaluation of tenured faculty is itself controversial and probably would not survive being tied to issues of retrenchment."³² Thus, it can be argued that the selection of the best teachers and researchers, in relation to the reduced program needs, effectively results in the termination of the other faculty as incompetent. Different procedures must be followed and different rights attach where terminations for "cause," such as incompetency, are made.³³ The use of a financial exigency or a reorganization process for this purpose would thus be deemed a subterfuge, thereby violating the principles of academic freedom and the contract of tenure without due process. "The obvious danger remains that 'financial exigency' can become too easy an excuse for dismissing a teacher who is merely unpopular or controversial or misunderstood—a way for the university to rid itself of an unwanted teacher but without, according to him, his important procedural rights."³⁴

While this argument has strong merit, the use of programmatic need and faculty performance in the process of identification of faculty for removal in budgetary reduction situations has been upheld by the courts as valid, and not equivalent to a causal termination. It was noted in the previous discussion of the tenure preference issue that other institutions have validly used administrative evaluations of program needs and the abilities of the faculty to meet those needs in identifying faculty for removal in such situations.³⁵

With the diversity of specialties and abilities of faculty even within specific programs, it would be necessary to precisely identify those faculty with the abilities needed to sustain a balanced program of reduced size. Such a process does not necessarily label a person not retained as incompetent. It states only that the university needs expertise in a specific area, and the faculty member removed has a different expertise or duplicates that of others. That faculty member may very well be one of the best persons in his/her academic field, but in relation to the needs of the university, that specialty is unnecessary or overstaffed. In this light, the process does not transform a reduction decision into an incompetency removal, but it does, of course, require comparisons between faculty and assessments of their relative merit.

³² Mortimer, *Procedures and Criteria for Faculty Retrenchment*, CHALLENGES OF RETRENCHMENT 168 (1981).

³³ *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Ferguson v. Thomas*, 430 F.2d 852, 856 (5th Cir. 1970); *Chung v. Park*, 514 F.2d 382, 386 (3d Cir.), cert. denied 423 U.S. 948 (1975).

³⁴ *Browzin v. Catholic Univ.*, 527 F.2d 843, 847 (D.C. Cir. 1975).

³⁵ See *supra* text accompanying notes 26 to 33.

Any institution planning for change—reduction—must first undergo a review process to determine which programs must be retained, and how large those programs should be, while still providing the highest quality education. In order to effect those goals once the programs are identified, it seems only logical to retain the staff best able to provide and maintain the instructional and research quality desired. This would be the best usage of institutional resources toward the accomplishment of the institution's goals.

Should guidelines requiring need and performance evaluations be adopted as policy, the next question would be how those guidelines are to be translated into implementation criteria which can be used in such an identification process. While the centralized development and implementation of such criteria has been upheld,³⁸ it seems more appropriate, given the decentralized nature of academic matters, to have the particular criteria developed and implemented by faculty at the college or departmental level. After the units slated for reduction are identified, and their size and programmatic goals determined, the faculty of these units should be directly involved in constructing criteria to be used in identifying faculty to be retained. This mode of operation would simultaneously create uniformity in the principles applied, and recognize the ability of faculty to make the initial recommendations based on personal knowledge of program needs and faculty performance. Yet, such a decentralized procedure would have an obvious negative impact on morale, for faculty would be asked to identify colleagues who should be removed.

4. *Should special consideration be given to protect the university's affirmative action accomplishments in any reduction process?*

Several alternative policy considerations for removal identification have been posed: tenure/non-tenure, seniority, program need, ability and performance. Whatever guidelines are ultimately selected, the question of exceptions to those guidelines for affirmative action purposes must be addressed.

In light of the fact that affirmative action requirements are relatively recent developments, a higher proportion of minorities and women (and other protected classes) will be found in the untenured ranks, or in the recently tenured ranks, than amongst the senior faculty. As a result, the use of a tenure priority or a seniority system in faculty reductions quite likely would have the impact of severely reducing the representation of

³⁸ *Id.* The Supreme Court of New Jersey upheld the promulgation by the New Jersey Board of Education of lay-off rules in the event of financial emergency as within the managerial prerogative of the Board despite the existence of a collective bargaining agreement. *Council of New Jersey State College Locals v. State Board of Higher Education*, 91 N.J. 18, 449 A.2d 1244 (1982).

minority groups in the faculty ranks. The reduction of women and minorities on the faculty would be at a higher percentage than the percentage of faculty being reduced overall.

The consequences of reducing the number of women and minorities on the faculty would be extensive and problematic. First, the gross employment of members of identified categories would be reduced, making it virtually impossible for an institution to meet any employment goals which may have been negotiated with federal monitoring agencies. As a result, the institution could be subject to penalties, including grant and contract debarment. Second, many specialized accreditation agencies have affirmative action components among their evaluation criteria. If disproportionate numbers of minority and women faculty are reduced, accreditation problems may arise.

If protecting affirmative action is adopted as policy, an institution will surely face the allegation of reverse discrimination. In addressing this issue, the Supreme Court has held that race, and other diversity-related characteristics, can be taken into account in various situations, including student admissions³⁷ and access to special apprenticeship and training programs.³⁸ Taking such considerations into account in faculty removal situations has not been judicially resolved, nor, of course, do federal affirmative action requirements formally go beyond the search and employment situations.³⁹

But just as in the policy issues previously discussed, this policy question involves a consideration of what is best for the university. If it is best to have a diverse faculty at the present staffing levels, is it not best to

³⁷ *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

³⁸ *United Steelworkers of Am. v. Weber*, 443 U.S. 193, reh'g denied, 444 U.S. 889 (1979).

³⁹ Recognizing the potential adverse impact on women and minorities which could result from layoffs "in recessionary periods, such as the current one . . ." the Equal Employment Opportunity Commission expressed its concern for these groups and itself sought information as to methodologies to assist these groups.

The Commission is greatly concerned that because such layoffs usually have an adverse impact on minorities and women, the routine use of layoffs on a last-hired, first-fired basis is beginning to eradicate many recent affirmative gains made in the workplace. The Commission is, therefore, interested in investigating alternative approaches to layoffs which would satisfy the employer's reduced labor needs with a minimum of adverse impact on minorities and women.

Yet while the Commission's statement was in the form of an inquiry, it was simultaneously a warning:

However, even where a particular layoff may not be violative of Title VII, an employer may find itself vulnerable to private litigation or enforcement action by the EEOC or other governmental agencies, such as the Office of Federal Contract Compliance Programs, at a later date when the employer is in a new hiring phase. The employer may be confronted with a situation where it has to institute or reinstitute affirmative action plans because its earlier efforts to correct past discrimination were largely nullified by intervening layoffs.

45 Fed. Reg. 60832 (1980).

maintain that diversity at reduced staffing levels? To accomplish this, special consideration must be given to retaining women, minorities, veterans, and the handicapped in any reduction policy guidelines adopted.

5. *Should special consideration be given to retaining faculty with longevity of employment and who are reasonably close to retirement?*

Just as it must address the affirmative action preference question, an institution must consider protecting those faculty members who are approaching retirement but are not yet eligible to elect retirement benefits. Even in situations where program eliminations are to occur and all the faculty in a program are identified for removal, the issue arises as to the university's obligation to protect this senior group of faculty.

The Age Discrimination in Employment Act Amendments of 1978⁴⁰ basically prohibits the use of age in employment decisions. Persons between ages 40 and 70 are protected against discrimination and cannot be forced to retire against their will. Yet while the objective of any institutional preference in removals due to reorganization or financial exigency would be to affirmatively protect older faculty, those relatively younger faculty still within the 40-70 age bracket would be negatively discriminated against if such a protective policy were adopted for their more senior colleagues.

There are also policy reasons against adopting a longevity or retirement based guideline for faculty removal decisions. It is possible that some of the faculty in this senior age bracket are the least productive, and, if program need and performance criteria were used in the removal identification process, these faculty members might not be retained. Thus, it may not be in the best interests of the institution to protect this group of faculty.

On the affirmative side of this issue, the institution has a strong moral obligation to faculty who have given it long years of service and who may have been important in shaping their department and the university in the past. Their retirement salary is in part, what they have worked hard toward. As they now are about to reap those benefits, it is inhumane to put those benefits in jeopardy.

Certainly, innovative early retirement options can be developed for those faculty already eligible under an institution's retirement plan.⁴¹ Buy-out plans and partial reemployment options should be developed for those faculty who wish to ease out of academia without loss of retirement benefits. But while these options may address the needs of a select few

⁴⁰ 29 U.S.C. § 631 (Supp. IV 1980).

⁴¹ Harclerod, *Escape Routes: Do They Exist?*, in *NEW DIRECTIONS FOR INSTITUTIONAL RESEARCH: COPING WITH FACULTY REDUCTION* No. 30 (S.R. Hample ed. 1981) at 79-96.

faculty, they do not resolve the policy dilemma of whether such a group should receive preferential institutional treatment. Clearly compassion bodes for affording this age group special dispensations, yet certain legal and practical realities must necessarily be weighed for the other side.

III. FACULTY RIGHTS AND PREROGATIVES IN THE EVENT OF REMOVAL

Should it be necessary for reorganization or financial exigency procedures to be activated and for faculty to be removed, there are additional issues to be addressed. Institutional rules, AAUP policies, or legal precedents governing faculty removals give faculty certain rights and prerogatives, which traditionally include:

1. Placement in another unit;
2. Retraining;
3. Appeal of the removal decision; and
4. Replacement rights of released faculty.

It is necessary to review these prerogatives, and their implications.

1. *Placement in another unit.*

In the event of faculty removals because of institutional reorganization or financial exigency, tenured (or tenure eligible) faculty members normally have the right to be considered for open positions in other units. The AAUP Regulations state that before terminating an appointment because of financial exigency, the institution, with faculty participation, will make every effort to place the faculty member concerned in another suitable position within the institution.⁴²

However, in a time of financial retrenchment there likely will be no "available" positions elsewhere. In fact, before an institution can declare a financial exigency, it must have already exhausted all other avenues of reducing its expenditures, including cutting vacant positions and freezing new hiring.⁴³

If the policy decision is made to give tenured faculty a priority over non-tenured faculty in removal matters, it could be argued that no tenured faculty member should be removed until *all* untenured faculty members are removed throughout the university. If a tenured faculty member is in a program that is being reduced or eliminated, then that faculty member should not be removed from the institution if there are

⁴² AAUP Recommended Institutional Regulations, *supra* note 3, at 187.

⁴³ The AAUP Regulations provide that: "If the institution, because of financial exigency terminates appointments, it will not at the same time make new appointments except in extraordinary circumstances where a serious distortion in the academic program would otherwise result." *Id.* at 186.

non-tenured faculty in programs elsewhere in the university. Rather, the tenured faculty member should be transferred to another program and the non-tenured faculty member removed. This argument is bolstered by the AAUP Policy that "[t]he appointment of a faculty member with tenure will not be terminated in favor of retaining a faculty member without tenure, except in extraordinary circumstances where a serious distortion of the academic program would otherwise result."⁴⁴ One court considering this issue has stated that: "An institution truly motivated only by financial considerations would not hesitate to place the tenured professor in another position if one can be found, even if this meant displacing a non-tenured instructor."⁴⁵ Thus, there is strong agreement that a tenured faculty member should displace a non-tenured faculty member in another unit if that substitution will not distort the academic program.

However, there is no authority which would suggest that tenured faculty members are entitled to be placed in positions for which they are not qualified. However, at least one court has found that it is the "national academic community's understanding" that tenure includes the requirement that the university make a good faith effort to find another position for a released faculty member.⁴⁶ But the courts have never required a university to remove one faculty member to create a vacancy for another.

2. Retraining

The AAUP Financial Exigency guidelines state that tenured faculty members should be given the opportunity to "readapt within a department or elsewhere within the institution; institutional resources should be made available for assistance in readaptation."⁴⁷ Yet if specific university rules do not require it to provide retraining to enable a removed faculty member to enter a new area within the university, the courts have not required it. "[I]n the absence of an explicit contractual undertaking, the evidence discloses that tenure does not entitle a professor to training for appointment in another discipline."⁴⁸ Nonetheless, even though not judicially required, reasonable consideration should be given to retraining faculty, taking into account the time and expense it would take to do so. In *Krotkoff*,⁴⁹ the court, though first finding the faculty member had no contractual right to retraining, still considered the issue and upheld the university's denial of retraining where it found that it would take two to four years to retrain a Germanics professor for a vacant

⁴⁴ AAUP Financial Exigency, *supra* note 23, at 267.

⁴⁵ *Browzin v. Catholic Univ. of Am.*, 527 F.2d 843, 847 (D.C. Cir. 1975).

⁴⁶ *Krotkoff v. Goucher Coll.*, 585 F.2d 675, 679 (4th Cir. 1978).

⁴⁷ AAUP Financial Exigency, *supra* note 20, at 267.

⁴⁸ *Krotkoff v. Goucher Coll.*, 585 F.2d 675, 682 (4th Cir. 1978), citing *Browzin v. Catholic Univ. of Am.*, 527 F.2d 843, 850-51 (D.C. Cir. 1975).

⁴⁹ *Krotkoff*, 585 F.2d 675.

position in economics. Thus, the institution's obligation to the faculty member is fulfilled if it makes a good faith effort to place the removed faculty member in a vacant position for which he or she is presently qualified, or if it offers minimal training. "If no position is available in the institution, with or without training, the faculty member's appointment may be terminated."⁵⁰

3. Appeal of the removal decision

Because removals of faculty for financial exigency or educational reorganization reasons do not fall within the concept of termination for "cause," requiring full due process hearings to protect the liberty and property interests at stake in such situations,⁵¹ more limited appeal rights for faculty are permissible. In *Johnson v. Board of Regents of the University of Wisconsin System*,⁵² the court outlined the minimal due process elements institutions are required to make available to faculty who appeal their layoffs due to financial retrenchment:

furnishing each [faculty member] with a reasonably adequate written statement of the basis for the initial decision to lay off; furnishing each [faculty member] with a reasonably adequate description of the manner in which the initial decision had been arrived at; making a reasonably adequate disclosure to each [faculty member] of the information and data upon which the decision-makers had relied; and providing each [faculty member] the opportunity to respond.⁵³

Another important difference between the due process procedures which must be afforded faculty in removals due to financial exigency or institutional reorganization, as opposed to those procedures afforded in terminations for cause, is the time at which these procedures must be offered. Faculty may not have their property interests impaired through termination for cause until appropriate due process is afforded. However, the due process procedures to be offered in removals for reorganization may be afforded after the termination is effected.⁵⁴

The AAUP Regulations stipulate that at least a year's notice should be given to faculty removed for reasons of reorganization or financial exigency.⁵⁵ However, institutions faced with financial crises are often unable to provide such lengthy notice periods. Indeed, the courts have approved removals for financial exigency with notice as short as 30 days.⁵⁶ However, the length of notice should be as long as possible,

⁵⁰ AAUP Financial Exigency Guidelines, *supra* note 19 at 267.

⁵¹ See cases cited *supra* note 33.

⁵² 377 F. Supp. 227 (W.D. Wis. 1974), *aff'd*, 510 F.2d 975 (7th Cir. 1975).

⁵³ *Johnson*, 377 F. Supp. at 240.

⁵⁴ *Klien v. Board of Higher Educ. of the City of New York*, 434 F. Supp. 1113 (S.D.N.Y. 1977).

⁵⁵ AAUP Recommended Institutional Regulations, *supra* note 3, at 189.

⁵⁶ *Klien*, 434 F. Supp. 1113.

reasonable in light of the basis for the removals, and certainly, if institutional rules exist which prescribe the notice period, in accord with those rules.

4. *Replacement rights of released faculty*

The AAUP Regulations provide that a faculty member removed for reasons of financial exigency retains the right of first refusal on his or her position should it become available within three years of his or her removal.⁵⁷ This AAUP policy confines that right of reinstatement to the "place" from which the faculty member was removed (i.e., the program). A more general reinstatement policy could be granted by institutions. Removed faculty might be given preference for positions anywhere in the institution for which they are qualified. This approach seems more reasonable particularly where faculty are removed due to program eliminations and their "place" would never reappear.

Whatever reinstatement provisions are adopted, all removed faculty should be given the same reemployment opportunities. No removed faculty should be excluded from the rights afforded others, similarly situated, for to do so raises the inference that factors other than those espoused for the original removal decision were used.

CONCLUSION

It is essential that any institutional reorganization plan, whether through the advent of a declaration of financial exigency or by means of selected program reductions or eliminations, be based upon a solid educational foundation. Before any movement is made towards necessitated change, an educational plan for the institution must be developed. Only with such foundation in place can the policy issues guiding the program and faculty elimination selection and implementation criteria withstand legal challenge. And while the issues concerning tenure and job retention ultimately receive the central focus in any such reorganization, reduction methodologies must be decided from a policy perspective—considering what is best for the institution—rather than from an emotional or purely legal perspective.

Tenure's real concern is with arbitrary dismissals based on an administrator's or a trustee's distaste for the content of a professor's teaching or research, or even for positions taken completely outside the campus setting. . . . Dismissals based on financial exigency, unlike those for cause or disability, are impersonal; they are unrelated to the views of the dismissed teachers. A professor whose appointment is terminated because of financial exigency will not be replaced by another with more conventional views or better connections. Hence, bona fide dismissals based on financial exigency do not threaten the values protected by tenure.⁵⁸

⁵⁷ AAUP Recommended Institutional Regulations, *supra* note 3, at 187.

⁵⁸ Krotkoff v. Goucher Coll., 585 F.2d 675, 680 (4th Cir. 1978).



Procedures and Criteria for Faculty Retrenchment

Kenneth P. Mortimer

Enrollment uncertainty, growing student preference for professional as opposed to liberal arts programs, and the gap between revenues and expenditures—all these conditions combine to challenge the creativity and ingenuity of administrators in postsecondary education (Mortimer and Tierney, 1979). In its final report, the Carnegie Council on Policy Studies in Higher Education (1980, p. 1) argues: "During the next twenty years, enrollments may fall even as the total population continues to rise; real resources available to and used by colleges and universities also may decline, even if and as the total GNP keeps increasing. This dramatic new situation has given rise to a great sense of uncertainty within higher education, to many fears, and to some hopes."

As this volume illustrates, faculty retrenchment is only one of the responses to enrollment decline and financial stringency, although the most visible and controversial. This chapter reviews the experience with faculty retrenchment in postsecondary educa-

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tion, especially in the public sector. It also outlines the procedures and criteria that should be followed in the dismissal or termination of faculty in mid-contract for other than medical or just-cause reasons. Collapsing vacant positions, using more part-time faculty, imposing tenure quotas, or raising the standards for achieving tenure may constitute important ways of coping with enrollment problems and financial stringency, but the dismissal of tenured or tenure-eligible faculty involves a host of special legal, procedural, and policy issues.

The experience with faculty cutbacks in the 1970s was substantial. As early as 1971, in a survey of the membership of the Association of American Colleges, Gillis reported that seven of fifty-four respondents had already found it necessary for reasons of financial exigency to terminate one or more tenured members of the faculty (p. 367). It is difficult to unravel the rather serious conditions that prevailed at the City University of New York (CUNY) during 1975 and 1976, but an investigating committee of the American Association of University Professors (1977a, p. 80) reported that there were 1,000 terminations: "The retrenchment was accomplished without terminating the appointment of any full-time teaching faculty with tenure as recognized by the statute and by-laws governing the university. The appointments of a number of counselors, administrative officers, laboratory technicians, and other nonteaching staff with tenure were terminated. Also terminated were the appointments of an unknown number of full-time lecturers with a hybrid sort of tenure that this association would characterize as an entitlement to unqualified tenure. Finally, the appointments of about ten professors who were informed that they would be granted tenure were terminated before the statutory date—September 1—when their indefinite tenure would have commenced."

Faculty terminations at the State University of New York (SUNY) have received less attention than those at CUNY but have involved more tenured full-time faculty. According to the AAUP's investigating committee, 103 faculty at SUNY were terminated on the grounds of retrenchment from September 1974 through September 1976 (American Association of University Professors, 1977b, p. 244). Of these terminations sixty-two involved tenured

faculty, only thirty-four of whom were reemployed elsewhere within the system.

In Wisconsin in late 1972, the legislature mandated successive 2.5 percent cuts in the personnel budgets of the university system for the years 1973-74 and 1974-75. The regents of the university decided that the faculty members affected were not to be terminated but, rather, were to be laid off. According to Furniss (1974a, p. 164), they "would retain their titles and rank . . . [but] were to be without salaries and duties; for two years they were to have first chance of reinstatement if their positions reopened; and assistance was to be given them in finding other employment within the system." The university created a procedure for determining faculty members who could be laid off; it also created an appeal procedure. It then laid off eighty-eight tenured faculty members. In May 1974 thirty-four additional tenured faculty were laid off, effective May 1975. (An eventual court decision, *Johnson v. Board of Regents*, sustained the faculty dismissals; see Leder, 1975, for a discussion of the case.) According to Pondrom (1980), many of these layoffs were later rescinded.

Case Study: Pennsylvania State College and University System

The Pennsylvania system of fourteen campuses had been in the "retrenchment era" for the entire decade of the 1970s but until 1979 had succeeded in avoiding the actual termination of tenured faculty. The details of this experience from 1974 to 1980 are summarized in the following discussion.

The 1975-76 Retrenchment. The series of events that engulfed the Pennsylvania State College and University System from 1971 to the fall of 1976 have been recounted in some detail elsewhere and can only be summarized here (Johnson and Mortimer, 1977, pp. 47-68). This fourteen-campus system was organized for collective bargaining in 1971, and the bargaining unit consisted of almost 4,000 faculty. The colleges are owned by the state of Pennsylvania, and, although they have both a separate system board and local boards of trustees, the essential details of their operation are controlled by the Pennsylvania Department of Education. In late 1974 the Department of Education, facing a probable revenue-

expenditure gap of some \$16 million in 1975-76, began to consider retrenchment. Since, in November 1973, the Department of Education and the faculty union had signed an agreement providing for a moratorium on retrenchment through the end of the academic year 1974-75, and had later agreed to extend this ban through 1975-76, the Department of Education and the separate colleges were obligated to live with the legislature's appropriations for the 1975-76 year and to plan any retrenchments for the 1976-77 year.

In early 1975, partially because of its dissatisfaction with the retrenchment provision in the 1974 contracts, the Department of Education conducted retrenchment simulations at two of the state colleges. At the time the governor's budget request was released, in March 1975, the department was well on the way to understanding how retrenchment could be achieved. Based on the *assumption* that the colleges might be operating on a budgetary "deficit" of \$16.7 million during 1975-76, which would carry over into 1976-77, the department proceeded to develop guidelines for personnel retrenchment, to be effective September 1976. The twelve retrenchment guidelines are too detailed to be cited here in full, but the four more important provisions are listed below.

First, retrenchment projections for 1976-77 were based on the *projected* discrepancy between funds needed and funds available for 1976-77. Each college was given a prorated budgetary "deficit," for which it would have to compensate by personnel cutbacks. If actual salary increases were higher or lower than projected for the coming year, retrenchment requirements might be decreased or increased as appropriate. This link with salaries was to prove crucial in later negotiations.

Second, the following priorities were to be considered in the retrenchment of teaching faculties: (1) protection of new state college missions approved by the state college planning commission and the Board of State College and University Directors in January 1975; (2) affirmative action; and (3) other programmatic considerations, including complementarity of academic programs among the various state colleges in a given geographical area of the state. Seniority appeared to be given fourth priority.

Third, retrenchment of management and nonteaching professional positions was to occur at approximately one and a half

times that of the teaching faculty (later changed to a rate equal to that of the teaching faculty), and nonacademic personnel would be retrenched in direct proportion to the total number of all positions to be reduced at the college.

Fourth, after the submission of retrenchment lists on June 30, 1975, each president could submit a statement concerning alternative cost-saving approaches designed to reduce retrenchment. The retrenchment plan was subsequently labeled Plan A, and the alternatives to retrenchment, Plan B.

The state college presidents pressed the Department of Education to allow the alternatives (Plan B) to be submitted before the retrenchment list (Plan A), but the department remained convinced that significant economies no longer could be achieved in nonpersonnel areas. (Significant reductions in nonpersonnel areas had been made in previous years.) One president indicated that he could achieve the cost reduction required of his college without retrenchment, and that the manner in which savings could be accomplished should be left to the individual institutions. He publicly announced his intention not to submit Plan A and was threatened with dismissal if he did not comply with the department's directives.

On September 8, 1975, the deadline for retrenchment letters, two hundred personnel (including eighty-two faculty) were informed that they would be involuntarily retrenched as of September 1976 unless budgetary conditions improved. Seven of the state colleges achieved sufficient cost savings in other areas to avoid involuntary retrenchments altogether.

The faculty union protested this retrenchment of eighty-two faculty members and proceeded to contest several aspects of the retrenchment process via the contractual grievance procedure. After a series of maneuvers on the part of both management and the union and separate rulings by the Pennsylvania Labor Relations Board, an arbitrator ruled in January 1976 that "the commonwealth was not required to prove financial exigency in order to proceed with retrenchment." Because, according to the arbitrator, there is a difference between retrenchment and termination, "tenured faculty were therefore unprotected by the provision in the faculty contract concerning termination of tenured faculty"

(Johnson and Mortimer, 1977, p. 53). (This last ruling was on the substance of the contractual language itself.)

Although the details concerning the eventual settlement of these grievances are rather complex, the commonwealth agreed to rescind the eighty-two retrenchment notices in exchange for a union agreement to hold across-the-board faculty increases to 3.83 percent for 1975-76 and 4 percent for 1976-77. Subsequent contract negotiations resulted in delaying further retrenchments for the 1977-78 and 1978-79 academic years.

The 1979-80 Retrenchment. In January 1979, however, the specter of retrenchment raised its head again when the commissioner of higher education issued a new set of guidelines for retrenchment, to take effect at the end of the 1979-80 academic year. The guidelines specified that all existing documents relative to a retrenchment discussion would be made available to the union, that procedures to identify the faculty to be retrenched would be instituted, and that any retrenchment decisions would be discussed with the union beginning in February 1979. These guidelines also pointed out that, in order for a faculty member to be retrenched in the fall of 1980, notices would have to be sent by September 8, 1979.

In September of 1979, ninety-nine faculty on four campuses received retrenchment notices, to be effective at the end of the 1979-80 academic year. Again the union was galvanized into action. It filed a grievance case, arguing that the commonwealth had violated the contract by failing to "meet and discuss" with the union prior to the notices.

In March of 1980, twelve of the eighteen retrenchments at East Stroudsburg were rescinded when the administration found out that the financial picture for 1980-81 was not as bleak as it had originally thought. Four retrenchments at Edinboro were rescinded for somewhat similar reasons. In May of 1980, the union was successful in getting the commonwealth to designate a full-time person to look for jobs for the terminated faculty. The union was also able to identify forty-six existing vacancies for which the terminated faculty might be qualified under the negotiated transfer policy. By July of 1980—because of a revised financial picture, resignations, retirements, transfers to other campuses, and so forth—the number of faculty designated for release had been re-

duced to fifty-nine. In the fall of 1980, an arbitrator was considering the cases of the remaining faculty slated for termination.

Lessons from the Case. The Pennsylvania case is intertwined with a number of other developments in the commonwealth's post-secondary education scene, but some specific points can be made.

First, the specter of retrenchment caused the campuses to look very carefully at staffing and financial patterns and resulted in severe reductions in nonpersonnel areas. In fact, it was embarrassing to the administration to uncover what cost savings could be made without retrenching.

Second, the issue of the transfer of faculty between campuses was brought to a head by the retrenchment experience. The system-level parties (the commonwealth and the union) negotiated a policy that specified procedures for the transfer of faculty among the campuses. This policy became part of the collective bargaining agreement.

Third, the political milieu of the Pennsylvania system during the 1975-76 retrenchment was quite different from that of the 1979-80 incident. All the chief protagonists at the system and state levels were different (the governor, the secretary of education, the deputy secretary, the commonwealth's chief negotiator, and the commissioner of higher education). The new commissioner left retrenchment decisions to each campus and specified only that procedural regularity be observed.

Fourth, whereas the campus presidents and the Board of State College and University Directors opposed the earlier retrenchment and believed that there were other alternatives, by 1979-80 they believed it to be necessary. Presidential support for faculty retrenchment was based, at least partially, on the rebudgeting incident of 1978-79. In August 1979, after the fiscal year had begun, the Department of Education announced a "rebudget," which reassigned \$2 million of the appropriation from five campuses to nine others. A number of presidents became convinced that "inefficient" or "deficit" campuses should be forced to retrench rather than be carried by the stronger campuses.

Fifth, the contractual requirement of a year's notice prior to the layoff's taking effect pushed some administrators to issue hasty retrenchment notices, apparently in an attempt to increase their

flexibility in the face of *possible* or projected financial crises. The retrenchment notices themselves put immense pressure on administrators to justify the projections and/or predictions. In the University of Wisconsin System, by contrast, state law requires that campus budgets be reduced as enrollment declines. In order to observe the one-year, timely-notice requirement of university policy, special funding was necessary, since the state requires that the university begin to repay funds in installments to the state as soon as fall enrollment is determined to be less than projected in the budget (Lee and Bowen, 1975, p. 105).

By way of summary, retrenchment in the Pennsylvania system has been regarded as the last straw in a long string of financial stringencies. It became a reality only after alternative actions had stripped the system of its flexibility.

Conditions Necessary for Retrenchment

The American Association of University Professors identifies four legitimate bases for terminating tenured faculty: cause, medical reasons, bona fide financial exigency, and bona fide program closure (Mortimer and Tierney, 1979, pp. 41-42). Cause and medical reasons are not of concern in this chapter, since they are usually confined to a single individual and apply only in the given case.

Financial Exigency. The AAUP's 1976 "Recommended Institutional Regulations on Academic Freedom and Tenure" (RIR) (American Association of University Professors, 1977c) states that financial exigency should be an imminent financial crisis that threatens survival of the institution as a whole and that cannot be alleviated by less drastic means. The Commission on Academic Affairs of the American Council on Education has prepared a critique of the RIR (Furniss, 1977). The commission's concern arises from three circumstances. First, since the term *financial exigency* is imprecise, courts may provide their own definitions, which might be quite different from the definition the institution in good faith was following. Second, the commission does not believe that the AAUP's definition should be accorded the status of common and accepted practice, as other AAUP documents are. Rather, it

should be regarded as *one source* of suggestions that institutions should consider when they seek workable ways to meet financial problems. Third, the commission argues that the document makes termination for financial exigency legitimate only when an entire institution is on the brink of bankruptcy and makes terminations for program change legitimate only when no financial considerations are involved—that is, when the terminations are essentially an educational matter. There are, the commission believes, many intermediate positions between these extremes. In short, experience with difficult financial conditions is too limited and the issues are too complex to have the AAUP or anyone else produce a good *universal* policy and procedural statement.

These criticisms focus attention on the usefulness of the AAUP's entire range of statements—first, as guidance for institutional policy; second, as documents explicitly developed for adaptation as institutional policy; and third, as guidance about standards of academic customs for use by a court of law (Furniss, 1978). In contrast to the concern expressed by the commission, Brown and Finkin (1978, p. 44), who are advocates for the AAUP point of view, argue: "To the extent the standards of academic freedom and tenure built up by the AAUP over the past sixty years represent a body of persuasive professional opinion, the courts should give weight to them; if the standards are arbitrary or unreasoned, they should not." (For discussions of court definitions of *exigency*, see Mix, 1978; Holloway, 1980; and Chapter Ten of this volume.)

Program Discontinuance. In a time of declining resources, the discontinuance of some academic programs is an almost inevitable outcome of budget gaps and of such processes as academic program review (described in Chapter Five). The decision whether to retain programs that do not meet or are low on specified criteria is an integral part of the entire academic review process.

Program closure is not *necessarily* a decision to dismiss tenured faculty. Indeed, the University of Michigan's policy on discontinuance of academic programs specifically states that the university has never released tenured faculty members because of program closure (see Davis and Dougherty, 1978). Furthermore, if it should become necessary to release tenured faculty within a program to be discontinued, every effort would be made to place tenured

faculty and staff in other suitable positions, perhaps through retraining.

It is equally clear that a decision to reduce the faculty or engage in reductions in force need not be a decision to close programs. As shown in the Pennsylvania State College and University case, the maintenance of program vitality is often a specific goal in retrenchment guidelines. The AAUP's report on the mass dismissals at the City University of New York (American Association of University Professors, 1977a, p. 72) indicates that only one of the stages in a five-stage decision-making process was the abandoning or curtailing of programs. Davis and Dougherty (1978) have discussed alternatives to program closure, including merger, transfer to another unit, joint programs with another institution, and transfer to another institution.

It is also apparent that substantial technical, bureaucratic, and emotional barriers confront an administration attempting to phase out programs (see Chapter Five).

Procedures Required in Faculty Retrenchment

Due Process Requirements. Due process and legal requirements constrain but do not cripple administrators considering retrenchment decisions. Terminating a tenured faculty member's contract for reasons of financial difficulties or program closure in a public institution is not the same formidable undertaking as dismissal for cause. "The necessity for reduction must be shown and certain considerations of due process come into play, but it is neither required nor desirable in such cases to demonstrate that an individual once judged fit to occupy a permanent position on the faculty no longer possesses such fitness" (Kurland, 1972, p. 306).

While the conditions of a given situation will dictate the specific reasons for retrenchment, the institution should make sure that (1) the reasons cited for retrenchment are demonstrably bona fide and not arbitrary or unreasonable; (2) individuals are not identified for retrenchment by constitutionally impermissible reasons, such as the exercise of First Amendment rights; (3) there is adequate consultation with existing faculty bodies; (4) the terminated faculty member is given written notice of the decision, the

information on which the decision is based, and an opportunity to respond (Mix, 1978, p. 16); (5) reasonable attempts are made to place the retrenchees elsewhere within the institution or system when that is feasible; (6) recall procedures and criteria are specified.

Bona Fide Action. The concept of bona fide action is not an easy one to document, since the "good faith" of an action often depends on the intent of the actor. The issue is whether administrations in financial difficulties have made reasonable efforts to find alternatives to retrenchment. Peterson (1976) suggests that the courts should allocate the burden of proof regarding the existence of exigency and of good faith dismissal: "In view of the institution's reliance on the existence of a financial exigency as grounds for dismissal and its possession of the records necessary to prove such a condition, the institution should be required to prove that an exigency actually exists. However, if the institution meets this burden, the faculty member should then be required to establish that he was dismissed for reasons other than financial exigency" (pp. 431-432).

Of course, one of the most obvious standards as to whether dismissals were bona fide is the extent to which the institution has followed its own previous policies in the staffing reductions that normally precede retrenchment of tenured faculty. For example, there should be no suspicion that the dismissal of a tenured faculty member is simply an attempt to gain flexibility in resource allocation and/or subsequent staffing decisions. (See Chapter Ten for examples of "good faith" and "bad faith" as interpreted by the courts.)

First Amendment Rights. The requirement that constitutionally impermissible reasons for retrenchment not be used is obvious. Due process rights cannot be violated, nor can the retrenchment be a result of a faculty member's exercise of free-speech rights. The corollary, however, is that criteria be identified well in advance, a subject to which we return later.

Adequate Consultation. The requirement for adequate faculty consultation is also obvious, but its implementation may be difficult in state systems of postsecondary education where faculty governance mechanisms at the state and/or system level are not well developed. The consultation will take different forms at the vary-

ing levels at which faculty are affected. A system-level union may negotiate general procedures for retrenchment, whereas a campus local will be more specific about the matter. The union may insist, for example, that the administration at the local campus must specify the criteria for identifying academic units to be the targets of retrenchment.

The existence of a unionized environment may be a crucial ingredient in attempts to involve faculty in retrenchment decisions in a meaningful way. In the Pennsylvania State College and University System, the union decided not to take part in the individual decisions on retrenchment. A system-level policy was negotiated, but the specific retrenchment decisions were appealed under the contractual grievance procedures. From the union's point of view, refusing to participate in individual campus retrenchment decisions may be a wise political strategy. Union members identifying other union members for the axe would be extremely disruptive to the organization.

Political tension between faculty and administration will affect the retrenchment process, whether or not the faculty are unionized. But the union contract would seem to require the administration to negotiate some type of agreement on retrenchment. (Lozier, 1977, p. 237, reports that about 60 percent of the contracts have retrenchment clauses.)

Minimal Procedures. The minimal procedures requirement set forth in *Johnson v. Wisconsin Board of Regents* (see Leder, 1975) specifies that each faculty member to be laid off must be furnished with a reasonably adequate written statement, an adequate description of the manner in which the decision has been arrived at, and an adequate disclosure of the information and data on which the decision is based. The faculty member also must be given the opportunity to appeal. Institutional attempts to find alternative employment for retrenchees often go beyond these minimal requirements, however. Some institutions have decided that they have an obligation to help retrenched faculty members be retrained, find new positions, and so forth. According to Pondrom (1980), the University of Wisconsin System has had some success in placing retrenched faculty members elsewhere in the university.

Recall. Whenever reasons other than program discontinuance are given for retrenchment, there is an implication that dismissed faculty members might be rehired if conditions should change. Procedures for rehiring or "recall" should be formulated at the same time that retrenchment decisions are being implemented. Recall policies should specify the criteria and procedures by which faculty members will be recalled.

Retrenchment Criteria

Establishing retrenchment criteria requires determining the units to be retrenched, the categories of personnel involved, the locus of tenure, affirmative action goals, the relative priority of these criteria, and the order of layoff.

Retrenchment Unit. The retrenchment decision must include definitions of the appropriate retrenchment unit. In Pennsylvania, for example, the secretary of education allocated retrenchment-planning targets to each campus. College administrators had a degree of flexibility in deciding how the targets would be implemented. These campus retrenchment targets were based on budget assumptions that honored the "extraordinary needs of colleges such as California, Cheyney, and Mansfield for a 'greater share' of the regular allocation of the total state college budget distributed on the basis of enrollment. To do otherwise would probably force a level of faculty reduction at each of these colleges that could weaken their ability to survive as institutions with comprehensive higher education programs" (Pennsylvania State College and University System, 1975, p. 3). This is an explicit recognition of the smaller size of these units and the difficulty in absorbing across-the-board cuts that a small campus suffers. It also preserves the integrity of Cheyney, the only predominantly black college in the system.

The same principle would apply to institutions as they seek to assign retrenchment targets to schools, colleges, divisions, departments, and/or programs. Other things being equal, the larger the unit, the more likely it is to be able to absorb retrenchment targets without a serious impact on educational programs.

Administrators should be aware that the definition of an appropriate retrenchment unit is one of the more controversial elements of a retrenchment policy. Many institutions have been operating with very small departments and/or programs. To define a very small department or program as the appropriate retrenchment unit may have the impact of identifying a specific person to be retrenched. A narrow retrenchment unit may limit the possibility of finding alternate employment for the terminated employee.

Personnel Categories. Retrenchment targets should be spread among the various categories of employees. The quickest way to get and sustain faculty antagonism about retrenchment is to avoid the retrenchment of nonacademic and administrative employees. The policy should establish roughly equivalent retrenchment ratios for these other employees. In Pennsylvania the original guidelines called for management positions at each college to be retrenched at a percentage rate of approximately one and a half times that of the teaching faculty.

Another issue is the extent to which administrators are teaching courses and performing other faculty duties. In a union environment, administrators doing faculty work will be the subject of intense bargaining.

Locus of Tenure. Retrenchment decisions will force institutions to reexamine whether tenure is based on a campus or in a system. Lee and Bowen (1975, p. 109) point out that two prestigious groups have reviewed this matter and arrived at diametrically opposed conclusions. The Carnegie Commission on Higher Education has suggested that employment contracts and tenure should be based in a multicampus system rather than on a particular campus, whereas the Commission on Academic Tenure in Higher Education believes that academic tenure should be held in the institution and not in the system as a whole. "The same uncertainty is found in the nine multicampus systems under study. In general, unless the decision has been forced upon them, multicampus administrators have attempted to avoid the issue. The reason is obvious: campus-based tenure runs counter to the concept of a single university, which most systems espouse. But system-wide tenure poses so many practical problems as to appear unrealistic" (p. 110).

A faculty transfer policy will be an important ingredient in any multicampus or system-level retrenchment policy. The likelihood of an effective transfer policy is directly related to the complexity of the system involved. For example, it may be possible to negotiate a transfer policy in the Pennsylvania State College and University System because the campuses have somewhat similar teaching missions. It would be quite difficult if not impossible to negotiate such a policy in a multicampus system composed of two-year community colleges, four-year technical institutes and liberal arts colleges, and major university centers. The politics of such transfers as well as their substantive soundness would be seriously called into question.

Affirmative Action Goals. Those responsible for formulating retrenchment policies must consider their impact on affirmative action goals. Unfortunately, minority and women faculty are likely to be among those most recently recruited and therefore most subject to being retrenched. Therefore, institutions may need to consider the extent to which retrenchment based strictly on seniority will damage the diversity—both racial and sexual—of the faculty.

Seniority Versus Other Criteria. Institutions must determine the relative priority to be given to the separate criteria in arriving at the order of retrenchment. Common criteria are employee status—part-timers are normally retrenched before full-timers; seniority (last in, first out); and program need, cost, and quality. The following quotation, from the University System of Georgia's 1980 draft policy, is illustrative: "In determining which faculty member's employment is to be terminated, consideration shall be given to tenure status, years of service to the institution, and to other factors deemed relevant, but the primary consideration shall be the maintenance of a sound educational program that is consistent with the mission of the institution and the affirmative action goals of the institution" (p. C-8).

A judgment about program balance and vitality is best made by people close to program decision areas. To quote Furniss (1974a, p. 167): "Despite efforts to keep a retrenchment policy objective, some kinds of judgment are not only necessary but also inevitable in the complex of decisions leading to faculty terminations and layoffs. The relative desirability of one course of action over

another must be evaluated, the relative attractiveness to potential students of one program over another must be estimated, and so on. . . . These kinds of evaluations and decisions are both necessary and appropriate as triggers for layoff or termination actions and are not challengeable on Fourteenth Amendment grounds as long as the decisions are objective in the sense that they deal with numbers or classes of persons rather than with individual cases."

After consideration is given to the criteria outlined above, one suggested order of layoff would be as follows:

1. Faculty members on part-time/temporary appointments.
2. Faculty members on full-time/temporary appointments.
3. Nontenured faculty in inverse order of continuous service within the institution.
4. Tenured faculty in inverse order of continuous service within the institution.
5. When two or more faculty members in 2, 3, or 4 above have the same amount of continuous service, the faculty member with the lesser rank shall be the first to be laid off.

Finally, retrenchment puts great pressure on procedures for evaluating tenured faculty. It is deceptively easy to argue that retrenchment decisions should take into account the relatively superior performance of one faculty member as opposed to another. But the issue of evaluation of tenured faculty is itself controversial and probably would not survive being tied to issues of retrenchment.

Concluding Remarks

This chapter has discussed retrenchment as an isolated and fairly limited response to conditions of enrollment decline, program discontinuance, and financial stringency. There are four points to be made in conclusion.

1. *Retrenchment is a solution looking for a problem.* Many other strategies have been followed by colleges and universities seeking to cope with environmental turbulence. These include greater use of part-time faculty, raising tenure standards, decremental budgets, and so forth. While the AAUP's "institutional survival" test appears

too severe, dismissing tenured faculty merely to gain additional flexibility seems too cavalier. The establishment of vital faculty development programs and better planning to avoid overstaffing are more humane solutions.

2. *Faculty do more than teach.* In research- and service-oriented institutions, faculty have more complex functions, and student contact hours are not the only measure of their worth. The decision to lay off faculty because there are not enough students to teach requires institutions to place greater emphasis on the teaching than on research or service functions. In research-oriented universities, there are *no* standardized teaching loads and *no* uniform standards of research productivity.

3. *Most retrenchments have to be made on projections rather than on actual conditions.* Timely-notice requirements make it necessary to issue notices at least a year before the action is to take place. Most projections are not accurate enough for this purpose.

4. *Retrenchment notices or the threat of retrenchment notices can have unanticipated consequences.* Not all of them are bad. Mankato State University in Minnesota found it necessary to reduce its faculty by 150 positions from 1970 to 1975 (Alm, Ehrle, and Webster, 1977). The university received its faculty allocation from the legislature through the State University Board on the basis of projected enrollments. When the enrollment decline hit, two problems became evident: (1) the notification requirement dictated that faculty had to be removed from the positions on the basis of *projections*; (2) microprojections for individual departments had to be made. Interesting coping strategies developed at Mankato: "A faculty member in the mathematics department asked if there wasn't some way that faculty could offer short-term minicourses. If these were taught as overload with no additional compensation, credit hours would be produced, faculty positions saved, and a lot of educational excitement generated as well. With the support of the administration, the idea quickly spread through the faculty, who heartily endorsed it. At the high point, some 600 minicourses were being offered each quarter. The additional credit hours supported an average of seven positions a year" (p. 160).

As Eugene Craven describes in Chapter Seven, numerous alternative strategies can be attempted prior to retrenchment.

The dismissal of tenured faculty should remain the "court of last resort."

For Further Reading

For a more complete description of the retrenchment process in the union environment of Pennsylvania, see Johnson and Mortimer (1977). Similarly, Alm, Ehrle, and Webster (1977) provide an analysis of the faculty reduction process at a public institution in Minnesota. Readers can familiarize themselves with the positions of the American Association of University Professors on dismissal of tenured faculty by reading the analyses by Furniss (1974a, 1977, 1978). See also various chapters in Hample's (1981) *New Directions for Institutional Research: Coping with Faculty Reduction*.

An institution facing faculty retrenchment often overlooks political considerations that may greatly affect the retrenchment process.

What if the Faculty Member to Be Laid Off Is the Governor's Brother?

Colleen Dolan-Greene

Beware of making a faculty layoff decision in a political vacuum. It is not enough to project faculty employment needs, to decide whether all units will suffer or only one, to analyze the budgetary and indirect implications, and to consider legal aspects (see Dougherty, Johnstone, and Hendrickson chapters, respectively, in this volume). All that effort can be wasted if the political realities of retrenchment are ignored or overlooked. An institutional research director who is an active participant in the planning for faculty reductions should alert the institution to this fact and could play a key role in predicting political realities. Two questions should be considered: (1) What are the distinguishing characteristics of the institution and the departments affected by the retrenchment? and (2) Why is the retrenchment occurring? This chapter will review the implications of both questions and highlight some of the experiences of institutions that have already implemented reductions. In addition, it will outline the

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policies that institutional research needs to develop concerning the release of data during a retrenchment.

The Personality of the University

Every university has a fairly unique personality that is the result of a combination of characteristics. Though personalities of different universities can be similar, no two are identical, and the distinctions will affect the retrenchment action. The institutional research director and other administrators who are knowledgeable about their institution should carefully review what they know and how the characteristics of the personality will affect any contemplated action. There are six sets of somewhat contrasting characteristics that can make a difference for an institution facing retrenchment: (1) institutional support—public or private, (2) faculty governance—strong versus weak, (3) faculty unionization—unionized or non-unionized, (4) executive leadership—strong versus weak, (5) academic reputation—excellent or mediocre, and (6) history of layoffs—initial versus repeated retrenchment. In addition, size contributes to a university's personality and can affect the politics of retrenchment. Each of these characteristics will be examined in order to highlight the type of political complication it can cause.

Institutional Support. The tongue-in-cheek title of this chapter suggests one aspect of the complications of institutional support. A state supported university could come under severe political pressure if the governor's brother was on the layoff list. It also may not be prudent to lay off the sister of the senator who heads the appropriation committee, but there may be occasions when an institution wants to do just that. For example, if the layoffs are necessitated by reductions in state appropriations, then one of the quickest ways to get the message to the state legislature about the real impact of such a budget may be to target a program for reduction which, even if it does not include the sibling of an important politician, is a favored program of a politician. That tactic should be used with caution and is mentioned only to illustrate an extreme. In actual practice it is more likely that the planning process will identify a program for retrenchment, and no one will have considered the political connections of the program. That was the case in 1977 when it was proposed that the speech and hearing service program of the Medical School be closed at the University of Michigan, based on evaluation of eroding academic quality coupled with the university's fiscal constraints.

Somehow it was overlooked that two of the members of the Board of Regents were also serving on the advisory board of the special speech therapy camp run by that department. It was quickly apparent that, even if the department were to disappear, the summer camp would continue.

Independent universities face a different set of possible political reactions when faced with retrenchment. Obviously, they also have boards that may be connected with a program or faculty member affected by retrenchment. More important for a private college's survival is the reaction that its major contributors may have. A benefactor who is vocal about his support and his interest in a particular program will probably be given deference when reductions are considered, even though a program is rarely supported entirely by one contributor. A greater need will be for someone (and why not the institutional research director?) to discover the not-so-obvious connections and examine some possibly unexpected outcomes. For instance, there is an immediate impact on fund raising when retrenchment occurs. Fund raising is hurt because people don't want to be associated with a loser. Just as Chrysler's automobile sales fell drastically when its government loan guarantees were being negotiated, rumors of retrenchment can slow the inflow of development funds, and actual retrenchment can dry it up completely. In turn, this could trigger a new round of retrenchment.

The internal politics of an institution should be considered in relation to financial support. Because tuition is the source of most revenue at independent institutions, the impact on enrollment of any program reduction should be considered carefully. A downward spiral can be caused even by reductions in nonacademic programs. As mundane a step as a deferral of maintenance, carried to the point that the campus becomes seedy-looking, can quickly affect enrollment prospects. Independent institutions can take solace from the observations of one author commenting on the descent from the "golden years" in higher education. Cheit (1973, p. v) stated that "private institutions seem to have adjusted more quickly and more adequately than public institutions."

Faculty Governance. There is a tradition in higher education, or at least a legend, that it is the faculty who allows the administration to govern an institution. As Mayhew stated (1979, p. 226), "that mandate can be removed by both overt and covert means." If there is the practice of a strong faculty governance structure, then the revocation of the mandate may occur at least partially in the

open forum of the faculty senate. The mechanics of retrenchment at many universities require the involvement of the faculty senate or at least a subcommittee of that body. The possibility of open discussion of details should be remembered when the decision is made to cut back programs or personnel. The administrators should not optimistically assume that decisions will not be questioned. Indeed, the opposite is more likely. It is not uncommon for a faculty to censure the president during a time of retrenchment. The impact of faculty discussion and action following a retrenchment announcement will be further explored in the second and third section of this chapter.

It is extremely unpleasant for a faculty body to have to consider which individuals should be laid off. As Mix noted (1978, p. 21), "the faculty want responsibility for formulating criteria for decision making, but they do not want to implement the decisions they themselves make, for example, which faculty will be dismissed." Traditional governance structures do not provide for such decisions (Mortimer and Tierney, 1979, p. 53). Any institution facing retrenchment should consider whether the faculty governance structure can withstand the trauma of being involved in the deliberations necessary to implement a reduction. It may not be practical to avoid action solely out of concern for the impact on governance, but the long range impact of action on even an effective governance structure should not be ignored. If the structure is weak at the time of retrenchment, it may be overcome by the political impact caused by the reduction.

Faculty Unionization. The bridge from an unorganized faculty to one represented by a union has frequently been provided by retrenchment. This is a political reality that any administration approaching such action should consider. It has been observed by Mayhew (1979, p. 226) that if the faculty is not consulted prior to action, they will probably unionize. He cites the University of San Francisco as an example. This was also the case at the University of Detroit, as will be described later.

Prior to announcing a retrenchment, it may be possible to alter the faculty's perception that union protection is needed. One key can be to provide due process. Any discussion of awarding or removing tenure will necessarily include consideration of due process. An institution may not be prepared to go as far as Rehmus suggested (1968, p. 12) in providing due process and establishing a grievance procedure that ends in neutral, binding arbitration. However, most institutions already have a grievance procedure established to handle

tenure or discrimination complaints, and the administration should review it and decide if it is appropriate or can be modified to handle problems that result from retrenchment. As Rehmus noted, "the keystone of the grievance process is the possibility of review of administrative decisions by qualified and independent neutrals" (p. 12). If the institution does not provide due process, the faculty may seek it in a court of law. In addition, if there is a perception that due process is lacking, it is probable that the American Association of University Professors (AAUP) will review the action after the fact.

In 1977, 1978, and 1979 the AAUP added to its censure list institutions that had implemented retrenchments without using "generally accepted academic standards" ("Developments Relating . . .," 1980, p. 222). The institutional research director and other administrators will have to judge what political impact AAUP censure would have on their campus. Because the AAUP is now considered to be a faculty union, the reaction to censure might be minimized. However, censure can create public relations problems for an institution, and the institutional research director should help the institution plan for this.

Campuses that already have a faculty union have other political realities to face when retrenchment is contemplated. The faculty union may be a partner in the decision. Unions have been successful in becoming involved in the retrenchment process. As Lozier has observed (1977, p. 244), "Specific provisions for faculty involvement in the development and implementation of retrenchment procedures were present in seventeen of the twenty-one four-year [institutions'] contracts, but in only thirteen of the thirty-three contracts for two-year institutions." He noted further that faculty involvement through a union, rather than through a faculty senate, is more common at two-year institutions.

Before the collective bargaining agreement is negotiated, the institution will need to decide what it feels is an acceptable role for the faculty union in retrenchment decision making. Then, in negotiations, an attempt can be made to write this into the contract.

In the abstract, it may be difficult to perceive that the involvement of the union can "at least for the short run, be antithetical to the economic well-being of the institution" (Mayhew, 1979, p. 65). However, any retrenchment decision must deal with the probability that the faculty union will be primarily concerned with protecting the membership and not in the quality of programs or the finances of the institution. The union will press its demands during the process

of retrenchment, and if unsuccessful in providing job security, it will probably challenge both the process and notices of layoff issued to individuals through the grievance procedure. In planning for retrenchment, the administration should be aware that the political realities of the effort will linger long after action is taken. This is particularly true when the faculty union challenges the action through the grievance procedure or by funding a legal challenge of the process.

Executive Leadership. It has been observed by Mayhew (1979, p. 30) that "the majority of serious institutional pathologies stem from administrative failure." This should be remembered when trying to gauge the possible political reactions to retrenchment. It has already been noted that the faculty may respond by attempting to censure the president. If that occurs, what will be the board's reaction? Will it support the president and the administration, or will it use the censure vote to justify the dismissal of the president? If there are administrative deficiencies, how are they correctable? "Rectifying administrative deficiency may not solve serious institutional problems, but not doing so will ensure continuation of serious difficulty" (Mayhew, p. 63).

A common tactic of a faculty faced with program reductions and layoffs is to challenge the size of the administration. A simple but dangerous response to this tactic is to reduce the number of administrators or add to their duties. Retrenchment is a time when serious challenges face an institution's administrators and they find themselves burdened with more details and responsibilities. If there is a surplus of administrators or types of administrative programs, it is advisable to cut back and thereby be better prepared for the faculty's questions. If there is not a surplus, the administration should be prepared to demonstrate the necessity for the number and types of administrators.

A strong executive officer will prepare the institution for the possibility—or in the eighties, the likelihood—of retrenchment. Careful planning may allow the institution to reduce the number of programs through attrition without actually having to lay off faculty. Yet there is a psychological impact on even the strongest executive who has to administer decline (Mayhew, 1979, p. 64). Institutions will probably find themselves in the presidential search process more frequently in the 1980s and 1990s with all the political ramifications that such searches produce. To retain executives with management and leadership skills, an institution that can foresee decline, and even faculty layoffs, should make every effort to provide support for the

chief executive and other administrative officers who must manage decline.

Academic Reputation. A strong academic reputation can be an advantage in two ways to an institution that faces retrenchment. First, if the university has long been identified with excellence, it is easier to justify those reductions designed to preserve quality education. The goals of maintaining and strengthening a few high quality programs will be politically more acceptable than merely deciding which mediocre lamb is first to be sacrificed for the sake of a mediocre flock. Preferably, such an institution will have an established practice of making qualitative judgments in faculty personnel decisions. This can provide it with its second advantage, the strong support argument that deciding who is to be laid off should be based not only on seniority but also on the strengths of the faculty members. Such an argument can be attractive, but it can also be political dynamite. As was noted earlier, it is not easy for faculty to participate in any decision regarding who is to go. Tenure decisions have long been based on confidential review of colleagues, but recent court challenges have questioned this. It is doubtful that confidentiality can be maintained when layoff decisions are being made at a time of an extremely limited market for faculty members.

An institution with a strong academic reputation can also be at a disadvantage as a result of that reputation. Though it is doubtful that anyone will articulate it so bluntly, it may be tempting to allow quality to diminish throughout an institution rather than face the harsh reality of eliminating a program. The institutional research director should be sensitive to this and bold enough to warn the institution not to take the easy road.

An institution that has been improving the quality of certain programs can have a political uproar on campus if it proposes a program reduction or elimination. That was the case at Temple University, according to Scully (1979, p. 4). When reductions were proposed, the layoff list included many visible, respected faculty members who had been recently hired and brought to Temple to help upgrade the quality of graduate programs and advanced research.

History of Layoffs. An institution that has never experienced a faculty retrenchment is liable to react in shocked disbelief to the word that a reduction is being planned. This will be true although the higher education press has carried many stories about the decline expected in the 1980s. If a programmatic reduction is announced, the students can usually be counted on to rally in support of their ma-

jors. Student papers will question the wisdom of the administration's decision, just as they question most decisions. The faculty who are affected will argue valiantly in support of themselves and the essential nature of their program. Many alternatives will be suggested, but they may be highly impractical. The institutional research director and other administrators should consider what skeletons may be in the institutional closet prior to any announcement. Does the university own a golf course that it intends to maintain although faculty will be dismissed? Is there a palatial mansion full of antiques, valuable paintings, and gold plumbing fixtures occupying the most prominent hill on campus? Has someone just awarded the university a grant to begin a major research project that will require the hiring of talented researchers and faculty in a new program area while other programs are being eliminated and faculty with different backgrounds are being laid off? It is much better to consider the existence of such non-instructional costs, prior to the announcement of a layoff, so that truthful and appropriate responses can be prepared to the questions that will be asked by students and faculty.

Administrators at institutions that have experienced retrenchment in the past should avoid a callous attitude toward the prospect of another layoff. It is possible that the faculty will be better prepared to react to any new plans for reduction because they have been through it before. The political climate may be changed because a different program has been identified for reduction or elimination. An administration that has gone through the exercise of carefully predicting the political consequences of a faculty retrenchment should be at an advantage because of the experience gained the first time. An institution should be careful not to lose that advantage by not following all the steps again.

Institutional Size. At a small institution, everyone tends to know, or at least know of, everyone else. This can be a tremendous advantage in fostering a strong sense of community, but it can be a disadvantage when the college experiences a loss. In the past this has been most frequently demonstrated when a small campus suffers the death of a member of the community. Faculty retrenchment brings another type of loss. Since the faculty is small, the impact will be tremendous. The relief experienced by the faculty members who do not receive a layoff notice will be quickly followed by grief for colleagues who did. Such action can split the strong sense of community that existed between the faculty and administration. Suddenly, the faculty will perceive that the administration is on the other side, and it may take years for the split to heal, if it does at all.

Large institutions have the depth of faculties and programs to insulate them from this aspect of retrenchment. The loss to any individual who is laid off is as great, and the impact on the colleagues in the department will still be there. But in larger institutions, it is less likely that the entire campus will be affected. In addition, large research institutions have had experience in dealing with program reductions even before the decline in student enrollments. Research projects and special grants come and go. New ones frequently demand faculty researchers who have different skills and specialties from those demanded by the previous grants. However, it will still be a drastic shock when retrenchments occur in teaching units. The institutional research director and other administrators should reflect on the differences and be prepared for them.

The Reasons for the Retrenchment

A careful review of the personality of an institution and the characteristics that contribute to that personality will be beneficial to the institutional research director and other administrators who face the probability of retrenchment. The first part of this chapter has highlighted some of the political effects of those characteristics. Through a review of institutional experiences in program reduction, this section will outline various reasons why retrenchment may be necessary and discuss how those reasons can also dictate political reactions. Learning from experiences at other institutions, institutional research directors should be able to minimize the political problems of retrenchment by predicting what may happen.

Program Elimination. The first retrenchment case to be considered occurred in 1976-77 at the University of Michigan's Department of Population Planning (DPP) in the School of Public Health (SPH). The institution is state supported, though this particular retrenchment decision was partially necessitated by a reduction in outside support. There is a well-established faculty governance structure at both the school and university levels. Although many state institutions in Michigan are unionized, there has not been enough support for a faculty union at the University of Michigan to call for a union election. Each school and college at the university takes pride in its autonomy, which focuses executive leadership at the dean's level. The SPH dean had been appointed in July 1974. The vice president for academic affairs is the chief budget officer and therefore plays a significant role in any retrenchment decision. The academic reputation of the university is very strong. Richard D. Mandell (1977), in

ranking American colleges and universities, discusses twenty-five great institutions, one of which is the University of Michigan. As is true with major research institutions, it was not unusual to have retrenchments of research areas supported by outside funding, but it was not common to have a reduction or elimination of an academic area. At the time this retrenchment recommendation was made, the university developed a policy to handle such situations and the School of Public Health was used to test the process. It is helpful to examine this retrenchment action in light of the history of the school. It was established in 1941 and the specialty of population planning was established in 1965. The program grew; in 1971, it was recommended that a separate department of population planning be established. The Board of Regents approved this recommendation in September 1971.

On July 9, 1974, the Executive Committee of the School of Public Health approved a procedure for the periodic review of all departments and programs. Detailed procedures that outlined the steps in the review went into effect in October 1975. The Department of Population Planning (DPP) was one of the initial three departments selected for review. As a result of that review, the executive committee recommended that DPP be eliminated, so the details of the procedure are important. Every five years a review was to focus on a specific program and the resources required to support it. The review was to assess the progress during the preceeding five years and to examine goals in light of the school's and the department's priorities. Existing problems were to be identified and future plans and requirements reviewed. In addition, there was to be a review of the commitments made by the university to the chairperson, with an evaluation of how well they had been fulfilled.

In accordance with this procedure, a population planning review committee was established in the fall of 1975. It was composed of five faculty members and two students from the School of Public Health, and two outside consultants. The review procedure required that, while reviewing the department, a decision would be made either to reappoint the department chairperson or to allow a relinquishing of the chair without onus.

On July 20, 1976, the review committee presented its finding to the executive committee which consisted of the dean and members of the faculty appointed by the board on the president's recommendation. Its purpose, according to the regent's bylaws, was to act as the executive officer for the school. In addition to assisting

with administrative functions, it was also charged with investigating and formulating educational and instructional policies for consideration by the faculty, and acting for the faculty in matters of budget, promotion, and appointments.

The first drafts of the outside consultant's report and the review committee's report were shared with the population planning faculty and department chairperson. In September 1976, both the faculty and chairperson were given separate opportunities to discuss the reports with the executive committee.

Both reports focused on academic weaknesses in DPP. The teaching load was low in both credit hours taught by individual faculty members and credit hour production for the entire department. Despite the light teaching load, research productivity was also low. Faculty members were seen as primarily operating as external consultants to outside agencies. This was seen as a further weakening of the department because the consulting activity was done either individually or in small groups and did not contribute to the reputation of the department.

While the executive committee was reviewing the reports and discussing them with faculty, students, and the chairperson, the dean was faced with financial problems for the school. It was expected that by 1978 major institutional funding from the Ford Foundation and the Agency for International Development (AID) would end. Both had provided major assistance to DPP. In September, the dean and his staff presented to the vice-president for academic affairs and the central administration the cumulative effects of federal funding losses, which dated from 1969. The estimated annual shortfall was expected to be \$900,000 by 1978-79. The DPP funding loss from Ford and AID would raise the shortfall to over \$1 million per year.

An additional problem presented itself when the DPP chairperson resigned. (The chairperson had been with the program since it was established in 1965.) The executive committee and the dean considered what was needed to recruit a new chairperson. It was difficult for them to imagine that a strong academic leader could be attracted to DPP without the commitment of funding to support new faculty positions, but current circumstances made it hard to justify additions. Given the projected reduction in funding for the entire school, growth in DPP could only occur by imposing severe restrictions on the operations of the other eight departments.

On February 2, 1977, the dean sent the "Final Recommendation Arising from Review of DPP" to the SPH faculty and the review

committee. It recommended the dissolution of DPP, effective July 1978. The executive committee could not justify placing DPP as the highest priority in SPH (which would be necessary to make up DPP's funding loss). The recommendation promised to honor contractual obligations to tenured faculty by reassigning them to other departments whose programs most closely matched the training and interests of individual faculty. To minimize professional disruption, it was also promised that maximum possible notice of termination would be given to faculty members without tenure and to other staff. This recommendation was forwarded to the Board of Regents for its February 17, 1977 meeting.

The political realities of the recommendation quickly became apparent. On February 4, the DPP faculty wrote an open letter to all SPH faculty, challenging the executive committee's recommendation on the basis that the school's governing faculty had not been consulted. The DPP faculty proposed a special meeting of the governing faculty on February 14. The dean responded by scheduling a special meeting on February 21, since the February 17 Board of Regents meeting would only be for initial discussion of the recommendation. In his response, the dean pointed out the broad, faculty-wide input that had been sought and received throughout the review process.

The faculty of DPP simultaneously sought support outside the university by addressing a letter to all other schools of public health and programs dealing with population planning. In the letter, they asked anyone with comments on the proposed action or DPP's quality to write the regents in care of the president, with copies sent to individual regents at their home addresses.

During the second week in February, the vice-president for academic affairs proposed procedures for "Discontinuance of Academic Programs." The regents were to review the procedure at their February 17 meeting; final guidelines would be approved by the board in March. The proposed process had three steps. First, an independent faculty peer group would review the proposed action. Second, the Office of the Vice President for Academic Affairs would review and decide on the recommendation, giving particular attention to university-wide implications. Finally, the board would review and act on the recommendation.

The vice-president decided to use the DPP case to test the procedure. Representatives from his office were assigned to review the DPP recommendation. They were to meet with the faculty during February.

The interim procedure stated that the criteria for eliminating a program ought to place the greatest emphasis on the quality and viability of the program. The quality issue was the primary one for the DPP faculty. The challenge to the executive committee's action was based on the inconsistency between their recommendation and the findings of outside consultants and the review committee regarding quality. The faculty's communication focused on the quality issue and their right to participate in any decision to eliminate a department.

Political reaction to the recommendation to discontinue DPP came primarily from three sources: off-campus persons, students, and faculty. The off-campus response was both national and international. Reviewing the files, it seems that as many letters came from outside the United States as within. This is a reflection of the makeup of the student body in DPP. In the fall of 1976, nearly one third of the students were from outside the United States. Interestingly, very few of the letters came from residents of Michigan, yet the regents are elected by the people of the state. It is possible that, had there been a stronger showing of support from Michigan residents, the final decision might have been different.

The student response came from recognized channels of representation. The Public Health Student Association (PHSA) protested the manner in which the decision was made. Their objection was that the executive committee had reached its decision without having open meetings and notifying students and faculty. Prior to the February 17 regents meeting, the PHSA demanded that the issue of DPP be reopened and the department allowed to present its case. The Asian Public Health Student Association, affiliated with the PHSA, joined in the procedural objections. However, the Asian PHSA primarily objected to the dissolution of DPP based on the substantive issue that population planning is an essential element of public health of particular importance in the third world. Both of these objections were directed to the regents prior to the February 17 meeting. The quality issue was used in a challenge sent to the dean on February 28. The Public Health Student Association took issue with statements that appeared in the press about the quality of DPP. They felt that such comments had damaged their career prospects. It was demanded that the dean formally and publicly apologize to them.

The faculty's response was formally solicited as part of the application of the interim procedures for the discontinuance of academic programs, when the Office of Academic Affairs conducted an

independent review of the recommendation to phase out DPP. Part of that review included a series of meetings held with the faculty. The faculty also reacted when the SPH Governing Faculty passed a resolution on February 21 charging the dean and executive committee to reconsider the question of terminating DPP and requesting that that curriculum committee, augmented by the department review committee, examine the role of DPP.

Faculty response outside SPH and DPP was apparent when the University of Michigan chapter of the American Association of University Professors (AAUP) passed a resolution on the discontinuance of DPP. It found that academic due process had been violated because the dean and executive committee had not sought faculty participation in the decision and had not given notice that the departmental review could result in program termination. In addition, the chapter charged that no justification had been provided to show financial exigency and the need to discontinue DPP. The vice-president for academic affairs was urged to take no action until the faculty of SPH decided on the termination of DPP.

In response to the governing faculty's resolution, a report was issued on March 16 by the curriculum committee augmented by the departmental review committee. On that same date, the executive committee passed a motion as a result of their reconsideration of the discontinuance of DPP. Both the report and motion recommended that an identifiable research and teaching presence be continued by the establishment of an interdepartmental Center for Population Planning with a director and an executive board. The report was unanimously adopted by the school faculty.

In April 1977, the Board of Regents approved the recommendation that DPP be dissolved and a Center of Population Planning be established. Looking back three years later, the dean stated that he would still make the same recommendation despite the months of turmoil. However, he feels that the public and political nature of the process will discourage other deans from closing a department under this procedure. The dean feels that the process should be less public and that the public nature of the process is a reflection of the management style of the vice-president under whom it developed. The vice-president believed that every issue could be carefully reasoned. If a proposal is made to close another department, it will be interesting to see if the dean's perceptions are correct. Perhaps the past three years (the process hasn't been used again) bear testimony to the

dean's observations and suggest that other deans are now developing ways, in effect, to discontinue a department without using the procedure.

Reallocation of Positions. The second retrenchment case to be considered occurred in the 1975-76 academic year at Oakland University. Oakland is located on the former Wilson estate, given to the state of Michigan for a branch of Michigan State University (MSU). In 1970, the university became independent of MSU, with its own board of trustees appointed by the governor, and its own president. That same year, the faculty decided to unionize and affiliated with the American Association of University Professors. The two events are related. Oakland was originally envisioned as an elite liberal arts institution. A high quality faculty was recruited with that goal in mind. When it became apparent that the institution was developing into a regional university serving a portion of the state's population, the faculty became disillusioned. The faculty unionization is at least partially the result of the disillusionment. The negotiations for the first collective bargaining agreement broke down at the beginning of the fall term in 1971, and Oakland has the dubious distinction of being the first four-year college or university to be closed by a faculty strike.

The person appointed to be Oakland's first president was one of the faculty members recruited to start the university. His original peers were involved in organizing the faculty union during his first year in office. As a result of collective bargaining, the role of the university (faculty) senate was challenged, and each year's negotiations resulted in at least slight changes in the type of issues that came before the senate.

The faculty retrenchment at Oakland took place under the provisions of the collective bargaining agreement. The agreement that brought a settlement of the 1971 strike did not cover retrenchment. However, it did contain a gross gauge of faculty work load measured by a student-faculty ratio. The ratio concept had been used by the state of Michigan in the appropriation process, and it was incorporated into the collective bargaining agreement under the pressure of the strike. The 1974-75 faculty agreement was the first one to contain provisions for layoff. The language of the agreement was somewhat abstract because neither side had any layoff experience or expectation that there would be a need for a layoff. The agreement gave the university the right to institute a layoff when the number of posi-

tions allocated to a unit exceeded the need in that unit. There was also provision for an expedited layoff with very short notice periods if there was a drastic reduction in the number of students.

Much to everyone's surprise, the regular layoff provisions that contained notices similar to those used in the tenure procedure were used in 1974-75. The university found itself with over-staffing in Modern Languages because the general educational requirements had changed and students were no longer required to take languages. Because five layoff notices were issued, the faculty union filed a grievance.

During the bargaining for the 1975-76 agreement, the layoff provisions were modified. Under that contract, when there was a decline in the student-faculty ratio, a regular layoff could occur with notice periods similar to those used in the tenure process. When there was a shift in student interest and demand, a position-shift layoff could occur. In that case, for every layoff in one unit, an additional position had to be added to another. The expedited layoff with its shortened notice periods had become a concern for the national AAUP. As a result, the Oakland AAUP proposed that, rather than an expedited layoff, the contract allow an automatic salary reduction when there was a drastic reduction in the number of students. Such a provision was included in the contract.

In October 1975, although the grievance over the 1974-75 layoff notices was still active, the director of institutional research prepared enrollment projections that became the basis for the 1976 position-shift layoffs. The projections focused on the expected enrollment by unit for 1977-78. That year was used because, if a layoff was announced in January 1976, it would be the end of the 1976-77 academic year before any layoff could be implemented.

On January 14, 1976, two sets of notices were issued in accordance with the faculty agreement. The first went to units that were losing a total of twenty positions as a result of the position-shift layoff. They were advised that the tenured full-time faculty within the affected department had sixty days to make a recommendation about the order of layoff. The second set of notices went to units that were gaining positions.

The AAUP was officially notified of the position-shift layoffs the day after the units were notified. The contract provided forty-five days for the union to comment on the proposed reallocations. Layoffs were planned in seven academic units. Two units would be virtually eliminated. One was the Academy of Dramatic Arts, which

was a two-year, non-degree program to train professional actors. The other was the Classics Department. Program offerings would be affected in the other five units. All communications from the university to the AAUP, the departments, and the faculty expressed the strong hope that normal faculty turnover before the spring of 1977 would make it possible to avoid actual layoffs.

The president of the Oakland AAUP asked that the university senate use the existing constitutional process to find alternatives to the layoffs. In effect, the AAUP was recognizing that the faculty governance structure could continue to play a separate role in the university despite the existence of a faculty union. The steering committee of the senate responded by asking the Academic Budget and Planning Committee to study the fiscal circumstances surrounding the administrative judgments leading to the decision. The Academic Policy Committee was to study the academic implications of the matter. Both committees were encouraged to develop alternative solutions to the problems that the position-shift layoffs attempted to solve. The two committees decided to join forces and tackle the problem in the two weeks they were given to comment. Six subcommittees were established on the following topics: budget alternatives, academic effects on the university and alternatives, position alternatives, possibilities of alternatives in enrollment trends, tenure implications and alternatives, and constitutional implications and alternatives.

The joint committee reported on alternatives to the proposed position-shift layoffs on February 13, 1976. The committees had one motion, three resolutions, and seven recommendations. Their motion supported the elimination of the Academy of Dramatic Arts unless adequate private endowment could be acquired to support it. The body of the report stated that this would not reduce but rather improve academic quality, because the training of professional actors could be replaced by a liberal arts degree administered by Speech Communications.

The first resolution recommended that the College of Arts and Sciences reconsider the proposed position-shift layoffs. If the new recommendations were to suspend a degree program, a major, or an academic unit, then it was recommended that the senate have the opportunity for full debate and legislative action.

Tenure was the topic of the second resolution. The body of the report recognized that the meaning of tenure had changed as a result of deleting the 1940 AAUP statement on academic freedom

and tenure and substituting layoff provisions. Instead of using the economic security concept of the 1940 statement, the Oakland layoff procedure was changed to focus on seniority within a department. This was an obvious problem for the faculty on the senate committees. The second resolution recommended to the president that, wherever possible, tenured faculty members capable of useful instruction would not be laid off by a position-shift layoff.

The third resolution was a recognition of the need to plan for the future. The body of the report repeatedly identified organizational problems or questions, such as the need for a process to re-evaluate and reconstitute programs and the impact new programs or general education requirements have on enrollment. It was recognized that, at a time of steady state enrollment, a consensus was needed about the configuration of the university.

By the end of March, most of the units had submitted a proposed order of layoffs to the university. Oakland was unable to agree to the order proposed for one department, and in accordance with the faculty agreement, the contested order was submitted to the Faculty Reemployment and Promotion Committee (FRPC) on March 30. That same day, layoff notices were sent to faculty members in units where there was agreement on the order of layoffs. Since the grievance filed as a result of the 1974-75 layoffs in Modern Languages was still awaiting the arbitrator's decision, faculty in that department received notices as part of the position-shift layoffs in 1975-76. Many of these Modern Language faculty members were then confused about their status, having been notified once of a layoff (effective at the end of the 1975-76 academic year) that was later appealed, and then having been notified again under a separate layoff decision. Clarifying telegrams and letters were sent to the faculty members. The controversy was settled on May 1 when the arbitrator's opinion was received. It upheld the layoffs and the faculty members were so informed.

It should be noted that the university cancelled layoff notices to departments on three different occasions when natural attrition took care of over-staffing. This was consistent with the university's original statements on January 15, when the position-shift layoff process began. It was also consistent with the university senate resolution about tenured faculty.

The FRPC responded with a proposed order of layoff for the contested department, which Oakland found acceptable. The second group of layoff letters was sent on April 29.

In the interim, the AAUP filed a grievance stating that the proposed layoffs did not take into account the impact of faculty attrition on the staffing level in three departments. This grievance was settled by extended discussion on July 27, 1976, and layoff notices were left in effect as a result.

The layoffs became effective May 1, 1977. Two other protests were filed by the AAUP after that date. On July 21, the AAUP wrote the provost and objected to laying off faculty when departments with new positions had not been successful in filling them. This matter was dropped by the AAUP in August following a discussion of the situation with the provost.

On October 25, 1977, the chairperson of the Classics Department filed a grievance protesting Oakland's alleged intention to have certain courses in the classics curriculum taught while classics faculty members were laid off. In response, Oakland denied it had any such plans. However, the university also asserted its right to follow such a course if it so desired, under the provisions of the collective bargaining agreement. Following the first answer by Oakland, the grievance was not carried forward by the AAUP.

It is obvious from reviewing the history of the position-shift layoff that the faculty union and the university senate had an effect on both the process and the outcome of the 1975-76 position-shift layoffs at Oakland. Since that time, there have been no other faculty layoffs. To some extent, this is due to changes in the contractual language about the student-faculty ratio, which make initiating a layoff more difficult. However, since enrollment has been increasing, there has been no need for a regular layoff. More importantly, the university is now using better management techniques and taking advantage of regular faculty turnover to avoid a situation like the 1975-76 year, when drastic action was needed to redistribute faculty positions.

Financial Exigency. The third case of layoffs occurred at the University of Detroit in December 1975, as a result of financial exigency being declared by the Board of Trustees. This university is an independent institution founded by the Jesuits in 1876. It has three campuses. The original campus is now the site of the Law School and the evening business administration program. It is located downtown just across from the Renaissance Center, which is a symbol of the city's revitalization. The Dental School has a separate campus a little over a mile east of the Law School. The main campus is in the northwest section of the city. The university had a very weak faculty governance system in 1975. The university's president has by tradition

been a member of the Jesuit order. At the time of the 1975 terminations, the president had been in office since 1966 and had seen the university through the end of the turbulent 1960s and the racial unrest that had occurred in the city and on the campus.

The university's small endowment contributed to a long history of financial difficulties. Enrollment began to decline in the early 1970s, and by the 1974-75 academic year, a group of faculty had therefore been issued terminal contracts. Most of these notices had been rescinded when regular turnover reduced the size of the faculty. Another method that the university had used to reduce or prevent a deficit was to eliminate vice-presidential positions. This led to a compounding of problems because there was no longer proper oversight and sound financial procedures were not established or enforced.

This deficiency had been recognized by the Board of Trustees. On July 1, 1975, a new Vice-President for Business and Finance took office. It was his challenge to normalize the budget process and help establish a sound financial base.

The 1975-76 academic year was opened on an optimistic note by the president in his remarks to the faculty. However, the new vice-president quickly discovered that the university faced serious problems. Unless corrective measures were taken, a deficit of at least \$2 million was projected for 1977-78.

The president appointed a special Budget Planning Committee, chaired by the vice-president, to develop a plan to avert a major deficit. That plan was approved by the Board of Trustees on December 23, 1975. In approving the plan, the board declared that a condition of financial exigency existed and the elimination of forty faculty positions was necessary. The board also took steps to assure the long-term stability of the university by approving the appointment of an executive vice-president (EVP). The president was to concentrate on fund raising while the EVP would be responsible for the administration of the university. The vice-president became EVP and was authorized to recruit a vice-president for academic affairs, a vice-president for student affairs, and a replacement for himself, that is, a vice-president for business and finance.

Following the board's decision, the Christmas holidays of faculty, chairpersons, and deans in the two affected colleges were devoted to identifying which faculty members were to be terminated. The dean of faculties consulted with the dean of the affected colleges, the university's legal counsel, and the Academic Affairs Council of the University Senate, in order to develop criteria to be used in

selecting faculty. Weighted criteria were developed (which totaled 100%):

Programmatic Need	50%
Length of Service	20%
Scholarship	15%
Teaching Effectiveness	10%
Terminal Degree	5%

Every department was instructed to develop a clear statement of program goals and to use that to apply the weighted criteria. By December 29, the two affected deans had to submit a list of faculty members to be terminated, along with a statement of the procedures used and a list of programs to be continued.

Forty faculty members received their termination notices by January 1; twenty-nine of them were tenured. Faculty were terminated in accordance with administrative procedures that provided for one year's salary in lieu of notice. The affected faculty members were immediately relieved of all teaching and other responsibilities, and fringe benefit coverage stopped.

The challenges to the university's action began even before the individuals were notified, and the political ramifications continue today. Prior to the individual notices, a group of faculty had petitioned the National Labor Relations Board (NLRB) for an election to determine whether there would be formal collective bargaining. This would be the third election at the university. In late 1973, during the last vote on collective bargaining, the choice had been to join no union, the campus chapter of the AAUP, or an affiliate of the National Education Association (NEA). A runoff election was necessary and a majority of the university's faculty voted for no union. By late 1975, the AAUP/NEA rivalry had ended and, in what was claimed at the time to be a first, a coalition between an NEA and an AAUP chapter petitioned to represent the faculty.

This coalition made plans to seek a court order to block the faculty terminations even before individuals were notified. Though the terminations were not successfully blocked, the court challenge resulted in a legal case that has not been completely settled at the time of writing this chapter.

The faculty coalition adopted the name "The University of Detroit Professors' Union" (UDPU). During the spring of 1976, it was obvious to the university administration that the UDPU would be successful in the NLRB election, so a Director of University Per-

sonnel was recruited who had experience in faculty collective bargaining. The faculty union was a reality before the director assumed office on May 10, 1976.

Negotiations for the first collective bargaining agreement began in November 1976, and were concluded by March 1977. The primary issue for the UDPU was economic security. The final agreement contained an article on layoff that stipulated the procedure to be followed in the case of a layoff. However, in a separate letter of agreement, the university promised not to issue any layoff notices to any tenured faculty during the term of the contract, which expired August 15, 1979. In addition, the faculty members who had been terminated January 1, 1976, were to be treated as if they were on layoff status until March 11, 1979, with full recall rights to any positions that would become available in their departments.

The coalition that had formed the UDPU was not formally recognized by the AAUP or NEA. But in October 1976, the UDPU formally affiliated with the Michigan Educational Association (MEA)/NEA. This too had an impact on the politics of this retrenchment. At the time the first faculty contract was settled, the UDPU announced that the MEA/NEA had agreed to provide legal support to faculty members protesting the 1976 terminations. As was mentioned earlier, this case is still in litigation, although the majority of the plaintiffs have reached individual settlements as a result of diligent efforts of university and union representatives.

In the summer of 1979, when the second faculty contract was being negotiated, the issue of job security was still a key to the settlement. At that time, the university was in the process of recruiting a new president, which caused a great deal of uncertainty. The UDPU once again demanded a moratorium on the retrenchment of tenured faculty. When a new president was selected, he had to decide even before assuming office whether this was acceptable to him. He agreed to the moratorium for the period of a two-year contract because financial forecasting could reasonably look that far into the future. It will be interesting to see how both sides approach the politics of retrenchment in the summer of 1981, when a new collective bargaining agreement will be negotiated.

The Role of Institutional Research

The challenge for any director of institutional research when the institution is considering retrenchment is how to face what May-

hew has called (1979, p. 130) "a sort of academic Murphy's law. . . . That every conceivable difficulty will in fact present itself." An intelligent reflection on the personality of the institution and the reasons for the retrenchment highlight some possible difficulties. The director should be prepared with two items before a layoff decision is made. First, accurate and reliable data should be available as a basis for the decision that the university administration must make. Second, a policy must be established which defines who is eligible to receive the data.

Reliable Data. The importance of accurate information is obvious from the cases presented. The reviews that led to the program elimination at the University of Michigan criticized the Department of Population Planning because the credit-hour load of the faculty was much lighter than in other departments. This was challenged by DPP, and information was circulated to all faculty members in the school contesting this claim. The dean eventually had to respond in writing to that challenge.

At Oakland, one of the reasons for layoffs is directly tied to a mathematical calculation of the student-faculty ratio. Even if a labor agreement does not require it, most institutions will examine the student-faculty ratio before instituting a layoff. The ratio is most valuable when historical and interdepartmental comparisons were available.

The University of Detroit case is an example of the importance of financial information that is sometimes maintained by institutional researchers. As Hendrickson demonstrates in another chapter in this volume, universities have had to justify the claim of financial exigency in a court of law. It has not been easy, and there is a guarantee that claims of financial exigency will be carefully examined when used to justify what is a traumatic experience for the affected faculty members. At a minimum, on most campuses a committee of the faculty senate will review this information.

Access to Data. Before a retrenchment decision is announced, institutional researchers should develop a policy that clearly defines who will have access to information. This policy should be approved by the institution's president, since it may be challenged in the heat of the political reaction to the decision.

Full access should be provided to the academic deans, administrative officers, and board members who are responsible for making the decision. There are five other groups that might seek access.

The first is the affected faculty. When a department is asked to

identify someone for layoff, the faculty will want to see the data that justify the decision. The types of information to be released and the manner in which they are provided need to be determined in advance. From a human relations perspective, the most difficult challenge will be to respond to faculty members who are laid off. The termination decisions at the University of Detroit were challenged by many individual faculty members. A committee of the university senate reviewed the procedure used in making the decision and made a stunning discovery: A simple mathematical error when the weighted criteria were applied resulted in the wrong faculty member being terminated. Based on similar errors, the committee recommended (and the board approved) reinstatement of five faculty members.

The second group is the faculty senate. In all three cases the senate played an important role in responding to the politics of retrenchment. It is usually best to provide as much information as possible to this group. However, this administrative decision may be influenced by the role and strength of the institution's faculty senate.

The faculty union is the third group. The collective bargaining agreement may define what information must be supplied to the union. If it does not, there is a strong possibility the union will demand access to certain information. The university's legal counsel and labor relations staff should be consulted when the policy is developed concerning the union's access to information.

The fourth group is comprised of students. At the University of Michigan, students majoring in population planning objected to statements made by the administration. Although their challenges were not quantitatively based, they were factual.

The news media make up the fifth group. The public relations staff probably has a policy about the release of information to the news media. That policy should be reviewed by the institutional research director and other administrators when retrenchment is imminent. The public relations staff can assist institutional research in another way by making the data understandable. A matrix presentation may be fine for deans who review the same data every semester, but data may be more understandable when presented in a different fashion to the general public, the news media, students, and faculty.

Conclusion

Lozier stated (1977, p. 25) that "the diplomacy with which retrenchment is handled will determine to a significant degree the

amount of turmoil through which an institution and its faculty will have to go." Diplomacy can be achieved by predicting the political realities that may occur during retrenchment. This can be done by first identifying the distinguishing characteristics of the institution and the department affected and, second, reviewing why the retrenchment is occurring. Neglected but foreseeable political realities should not prevent the institution from taking necessary action.

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Colleen Dolan-Greene is the personnel administrator for the personnel service center for all schools, colleges, institutes, and libraries at the University of Michigan. She first faced the politics of faculty retrenchment as labor relations manager at Oakland University in Rochester, Michigan. Next she experienced the aftermath of retrenchment when she became personnel director at the University of Detroit four months after forty faculty members were terminated because of financial exigency.

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AVOIDING LITIGATION RISKS IN
REDUCTIONS IN FORCE

by
Peter M. Panken
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Michael Starr
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By Peter M. Panken, Esq. and
Michael Starr, Esq.¹
Parker Chapin Flattau & Klimpl
1211 Avenue of the Americas
New York, New York 10036

UNDERSTANDING THE LITIGATION CONTEXT

Planning reductions in force ("RIF's") today necessarily includes planning to avoid litigation. While RIF's do spawn contract or WARN² litigation, the most serious legal challenges to RIF's are those alleging age or other prohibited discrimination in selecting terminees. Understanding who will bear what burdens of proof in that kind of lawsuit is the necessary context for planning a RIF without difficult litigation.

Plaintiffs in reductions in force most commonly claim they were terminated "because" they were members of a group protected from employment discrimination by federal and state laws. To prevail, the terminnee must prove that membership in a protected group status was the determining factor in their selection for adverse treatment in the reduction in force.

This issue normally turns on the intent of the employer. The only direct evidence of intent is the testimony of the actor but triers of fact are skeptical of testimony of sanctimonious intent.

¹ Peter M. Panken is the Chair of the Labor and Employment Law Department of Parker Chapin Flattau & Klimpl and is the President of the Metro New York Chapter of the Society For Human Resource Management.

Michael Starr is Counsel to Parker Chapin Flattau & Klimpl.

² Worker Adjustment and Retraining Notification Act 29 U.S.C. §2101 et seq. which requires sixty days notice of certain mass terminations.

The courts have, therefore, developed a complicated scheme of presumptions and shifting burdens to give plaintiffs a fair chance to reach the trier of fact without encouraging frivolous lawsuits.

A. The employee's "prima facie" case burden

The employee may force the employer to articulate its reasons for selecting the plaintiff by establishing a prima facie case (sometimes called raising a presumption of illegal discriminatory intent) by showing:

1. membership in a protected class,
2. termination (or some other adverse employment action), and
3. that someone not in the protected class received better treatment.³
E.g., McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

B. The employer's burden to articulate a legal reason

The burden of production (but not persuasion) then shifts to the employer to articulate a non-discriminatory business reason for its actions. E.g., Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

C. The presumption of illegality disappears

The prima facie presumption then disappears from the case and plaintiffs still have the burden of proving they were terminated because they were protected class members. E.g., Burdine, supra.

Plaintiff has the burden and opportunity to get to the trier of fact by showing that "a discriminatory reason more likely motivated the employer" or "that the employer's proffered

³ The articulation of elements may vary in the context of different discrimination suits but usually fits into this general pattern.

explanation is unworthy of credence" Burdine 450 U.S. at 256. Plaintiff may do this in a variety of ways including, inter alia:

1. Statistical proofs that there is a statistically significant adverse impact of the RIF on members of the protected classes which is not explainable by business reasons. (Actions speak louder than words.)
2. Actual admissions of illegal intent by authorized agents of the employer who acted in or influenced the reduction in force. (Anything an employer or agent says can be used against them.)
3. Anecdotal testimony usually about statements made by supervisors tending to show illegal intent (in effect, smoking gun statements). ("A smile and a suitcase," "the old fellow's lost it," "that ethnic groups is just lazy," etc.)
4. Evidence tending to show that the articulated reason is untrue. Because employers are presumably reasonable, the only reason to lie is to cover up illegal intent to discriminate (this begins to sound a lot like the notion of consciousness of guilt which arose in the criminal cases), and/or
5. Inconsistent statements made by someone who speaks for the employer (everyone had better be on the same wave length).

D. Defendants then have an opportunity (and burden) to show it would have happened anyway

Finally, if the plaintiff establishes "direct evidence" that discriminatory intent was "a determining factor" in their selection (whatever "direct evidence" may be), the employer is given an opportunity to prove that the plaintiff would have been treated in the same manner notwithstanding the proven fact that a discriminatory motive played a part in the decision. Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775 (1989).

The Bottom Line

With this scheme in mind, it becomes vitally important for an employer to take extra care in planning a RIF to avoid the fact and indicia of illegal discrimination. Most terminees leave jobs that they have been doing for some time have little difficulty asserting their prima facie case. Litigation then turns on the trier of fact's view of the employer's articulated reasons and plaintiff's evidence of pretext.

A finding of discrimination against members of protected classes eliminates the cost savings motivating the RIF, since a winning plaintiff will receive backpay for no work and the incumbent who was retained will already have been paid for the work.

Losing a litigation means the employer pays two people for the same work: the retained employee and the terminnee.

Losing an age discrimination claim can mean paying three times because a terminated employee is paid double damages as liquidated damages if the plaintiff shows that the unlawful age discrimination was "willful."

Losing a discrimination claim in some states can tack on damages for "pain and suffering" or even punitive damages if the judge or jury despises the employer's witnesses.

But the saddest fact is that no employer can "win" a discrimination suit. Defending a litigation successfully still costs employers' executive time and distraction and incurs considerable legal fees since the litigation most often requires that the entire work records of both the terminnee and the retained employees be presented to the trier of fact.

Careful planning of any reduction in force is necessary to preserve cost savings and avoid or prevail in litigation. The following Reduction in Force Methodologies and Checklist suggest a system for considering, ameliorating or eliminating unwarranted risks or at least allowing the employer to decide which level of risk it is willing to accept.

REDUCTION IN FORCE METHODOLOGIES

I. Understand What the Workforce Looks Like Before the RIF

Rationale: Knowing where you're coming from helps identify possible problem areas that may require special attention.

- A. Review or prepare Organizational Charts which accurately reflect the organization.
- B. Prepare EEO Category Analyses, overall and by appropriate categories (e.g., classifications, skill levels, or work areas)
 1. First analyze the numbers and percentages of **protected class**⁴ members in the workforce categories from which reductions are to be made.
 2. The analysis may be made by the employer's human resources professionals or the employer's attorneys. Using the latter may offer a modicum of privilege if proper precautions are observed, but the lawyer who does the analysis may have to testify and may thereby be disqualified from representing the employer in litigation.
 3. The analysis should be made in the following groupings:

⁴ **Protected classes** include: racial minorities, women, hispanics, asians, pacific islanders, native Americans and aleuts, other minority national origin groupings (which could include Americans in a foreign owned corporation), older workers (usually over 40), members of groups which may be protected from discrimination by state or local laws (whistleblower, affectional preference, marital status, sexual orientation, etc.), disabled (or handicapped) workers, and workers about to reach a new level of pension or employee benefit eligibility.

- a. EEO category of job level⁵,
- b. Job title or category as denominated in the employer's own records and personnel files⁶, and
- c. Overall and departmental employment units.

It is often useful to analyze each job grouping in terms of numbers and percentages of protected group members as compared to the non-protected class members.

But, of course, where the numbers of the total group are smaller than 50 , statistical significance is slight.

- C. Where the effect of a reduction in force at a higher employment level results in bumping down with displacement of employees in lower categories, it is also necessary to do the analysis for the peripherally affected classifications or groupings as well.

5 EEO categories for job levels should include at least the following 9 categories which are found in the EEO-1 form employers are required to file annually: Officials and Managers, Professionals, Technicians, Sales Workers, Office and Clerical, Craftsmen (skilled), Operatives (semi-skilled), Laborers (unskilled), and Service Workers.

6 Job category analysis can be done in the format in which the employer keeps its personnel records. Depending upon the sophistication of the employer's personnel function, this analysis could be by: departmental grouping, job title, labor grade, Hay (or similar pay or functional analysis system) category, other grouping regularly used by the employer (e.g. territory, plant, zone, function, etc.).

II. Understand What Motivates the RIF

Rationale: In litigation, the ultimate defense is the employer's legitimate business reason. Making that reason explicit will guide choices consistent with that reason and, if there is a lawsuit, avoid the appearance of pretext.

- A. Before designing or evaluating a reduction in force plan it is vital to understand why the employer is downsizing. It is also important to recognize the multiple reasons that may motivate the employer's selection processes and that not all of the reasons may be immediate economic necessity.
- B. Common reasons for a RIF:
 - reduce production.
 - abandon a line of business.
 - close a particular facility.
 - consolidate facilities.
 - restructure operations.
 - streamline or eliminate departments, functions, jobs or layers of management.
 - combine departments or functions.

III. Understand What the Personnel Structure Will Look Like After the RIF

Rationale: Defense of RIF litigation often turns on why the retained employee was kept on and the RIF'd employee terminated. Relating the retained position to the new organization -- and hence the purposes of the RIF -- cannot succeed unless planners are clear what the "future" is supposed to look like.

- A. What will the table of organization look like?

- B. What positions will be needed?
- C. How will each job be filled?
- D. How will the employer get from the present structure to the future structure?
 - 1. Which employees most appropriately fit the new organization?
 - 2. Which skills best fit the future organization?
 - 3. Who does not fit into the future at all?
 - 4. Must new skills be sought outside the organization or can incumbents adapt?

IV. Selection Methodologies

Rationale: Different selection strategies have different effects on (a) achieving the RIF's objectives and (b) avoiding litigation. Getting the right balance between these sometimes conflicting aims is crucial.

A. Seniority

- 1. Seniority has the advantage of being recognized as a "safe harbor" by most anti-discrimination statutes (e.g., it is permissible to observe the terms of a bona fide seniority system even if the result produces discrimination against individuals in the protected groups of age, 29 U.S.C. §623(f)(2) race, color, sex, religion, or national origin, 42 U.S.C. §2000e-2(h)). While the Americans with Disabilities Act, 42 U.S.C. §12101 et seq. contains no such safe harbor, selection by seniority is certainly not selection because of a disability.
- 2. Determining the measure of seniority.
 - a. Most recent date of hire (employer seniority).

- b. Date of entry into job or other category (job or category seniority).
 - c. Other seniority measures in use by the employer prior to the RIF.
 - 3. Can the employer lay off the least senior employees in the entire organization and then bump down more skilled or senior employees into vacant positions?
- B. Selection by ability and performance. It is vital to be able to explain and justify each termination or demotion of a protected class member.
- 1. Review personnel files and performance evaluations.
 - a. Every good word in a terminatee's performance evaluation will be claimed to be universal truth in subsequent suits.
 - b. Good evaluations do not prove illegal discrimination. But terminating those with better evaluations implies a hidden agenda. Adequate (or even excellent) employees are often terminated in reductions in force, so retaining better performers is defensible.
 - c. Employers wisely start their termination list with those whose performance evaluations have been less than adequate. But it is the fact of inadequate performance not the bare notation which may have to be proved if the termination is challenged.

2. When selecting terminees from a group of individuals who have adequate or superior performance evaluations, identify specific reasons for the choice.
 - a. Compare written personnel records and undertake contemporaneous comparative rating procedures.
 - b. Asking supervisors to give management a list of those who should be retained is only the beginning.
 - c. Make supervisors articulate their reasons and be able to justify the choice of potential plaintiff protected class members.
 - d. Ask supervisors and managers to rate the employees in the categories where jobs and incumbents are to be eliminated.
 - e. Have supervisors and managers rank incumbents in each job category from lowest to highest.
 - f. Do similar rankings for those considered for jobs left in the post-RIF structure.
 - g. Ask for detailed narrative reasons for the expressed preferences, preferably with specific examples of incompetent, inadequate, unimaginative or unsatisfactory work.
 - h. Cross check by having others rate and rank potential

terminees as well as those being retained.

i. If disagreement appears decide what risks to take.

3. Ask whether the rationale adopted will seem fair to a trier of fact (judge, jury or anti-discrimination agency). Fairness and fair warning are the hidden agenda of every termination litigation.

C. Sidestepping problems by offering an incentive for voluntary quits.

1. A voluntary quit is not actionable termination by the employer unless there is constructive discharge.

2. Constructive discharge usually requires an element of forcing employees to quit, often by creating intolerable working conditions.

3. An offer of increased benefits is normally not constructive discharge unless it is deemed an "offer you can't refuse." Henn v. National Geographic Soc., 819 F.2d 824 (7th Cir. 1987), cert. denied, 484 U.S. 964, 108 S.Ct. 454 (1987) citing "The Godfather."

V. The Final Termination Steps

A. Create a preliminary list of terminees

1. Those whose jobs have been eliminated and who were not placed in other jobs.

2. Those who have been eliminated for performance reasons.

3. Those who have been terminated for seniority reasons.

4. Those who have voluntarily quit.

B. Do a statistical analysis for potential exposure to suit

1. What is the protected class composition of the workforce before and after the RIF?
2. What is the protected class composition of relevant employee groupings before and after the RIF?
3. What is the protected class composition of employee groupings before and after the RIF after voluntary quits have been eliminated?
4. Where statistics render the underlying reasons for selections at risk, if the risk is not reasonably defensible, it may be necessary to change selection methodologies to eliminate or ameliorate the risk.

C. Check for other potential exposures

1. Worker Adjustment and Retraining Notification Act notice to employees and agencies for plant closing and mass layoffs.
2. Union contracts or Multi-Employer Pension Plan Act exposure.
3. Personnel Manual or Benefit Plan promises.
4. Individual employment promises or contracts.
5. Severance pay obligations under local law.

VI. Planning the Actual Terminations

- A. Prepare the voluntary termination offer package including a valid release of potential liability.
 1. Make sure the release is valid in that it is:
 - a. Knowing (suggest consultation with an attorney).
 - b. Voluntary (enough time to consider options).

- c. For additional valuable consideration (cash, benefits, outplacement assistance, etc.) over and above benefits to which terminees were otherwise entitled.
- d. Satisfies the requirements of the Older Workers Benefit Protection Act of 1990 ("OWBPA"), (104 Stat. 978) if a group over 40 are offered an exit incentive. This means that the release should:
 - (1) be written in understandable English;
 - (2) state that rights under the Age Act are being waived;
 - (3) does not waive future rights;
 - (4) gives at least 45 days to consider whether to accept the group exit incentive;
 - (5) provides a 7-day revocation period;
 - (6) advises individuals in writing to consult with an attorney;
 - (7) tells the individual (a) which groups of employees are eligible for the exit incentive, (b) any applicable eligibility factors or time limits, (c) the job titles and ages of all eligible or selected individuals, and (d) the ages of all individuals

in the same job classification or organizational unit who are not eligible or selected;

2. Allow sufficient time for the terminnee to consider the offer (OWBPA requires 21 days for individual releases, 45 days for exit incentives and 7 days to revoke).
 3. Be sure that severance pay promises of handbooks and contracts satisfy legal requirements and require a valid release of claims as a condition of receiving the benefit.
- B. Plan out what each terminnee will be told, by whom and where.
1. Will employees be asked to leave immediately? (May be impossible if WARN Act sixty day notice is required without incurring liability for sixty days pay which will not be consideration for the release of claims under anti-discrimination statutes.)
 2. If outplacement assistance is to be provided, outplacement counsellors may be made immediately available to take some of the sting out of the termination and prevent the terminnee from venting to the terminating supervisor. (Some companies give that job to personnel or human resources professionals for similar reasons.)
 3. In any event, have the terminator trained in what to expect (stunned silence, anger, violence, confrontation, etc.) and how to handle themselves.
- C. Plan the treatment of post termination inquiries
1. Prepare company employees and attorneys to answer questions about the termination from outside sources including unemployment insurance agencies, hostile lawyers, governmental agencies and potential employers.

- a. The best response usually is to attribute the termination to a reduction in force. This has the virtue of truth and does not hinder the terminees search for their next job.
 - b. Pay particular attention to governmental agency investigations. Defenses not raised early will look a lot like pretext if raised in later phases of litigation.
2. But never bad mouth the terminnee to potential employers.
- a. Re-employed terminees are less likely to sue and have gone far to mitigate their damages.
 - b. Out-of-work former employees hate. They are most likely to sue or at least invite governmental agencies to take a look at the RIF to see if any laws have been violated.

**REDUCTION IN FORCE
CHECKLIST**

- I. UNDERSTAND THE EMPLOYER'S OPERATIONS (WHERE ITS AT)
 - A. Management Structure
 - B. Departmental Structure
 - C. Operational Structure
 - D. Review or create job descriptions and organization charts

- II. UNDERSTAND WHAT THE EMPLOYER WANTS TO BE (WHERE'S IT GOING)
 - A. Will there be fewer managers with greater duties?
 - B. Will there be fewer levels (e.g. group leaders rather than supervisors)?
 - C. What will the Organization Chart look like?
 - D. What will new job descriptions look like?
 - E. What jobs will be eliminated?
 - F. What is the objective of the RIF?
 - 1. Cost Saving
 - 2. Improved Efficiency
 - 3. Automation
 - 4. Peter Principal elimination
 - 5. Going out of a particular line of business.

- III. DECIDE HOW TO GET THERE
 - A. Is LIFO possible? - The Safe Harbor of Seniority
 - 1. Should employees hired last leave?
 - 2. Should the last hired in each department or operational unit go?
 - 3. How is seniority to be measured?
 - a. Most recent date of hire by the employer.
 - b. Length of service in the position or department.
 - c. Date of entry into department.
 - d. Experience in the skill.

4. Can seniority be used for some classes on jobs and not others?
5. Should terminees be allowed to bump junior employees in other jobs or departments?

B. Should job elimination be used?

1. Shall incumbents be laid off?
2. Should laid off incumbents be allowed to bump less senior or less skilled in retained jobs?

C. Should the "best" be identified and the "worst" laid off?

1. Review, rate and rank candidates and their written records.
2. Start with those with inadequate performance.
3. Check and cross-check subjective judgments.
4. Should bumping be allowed?

D. Avoiding liability by encouraging voluntary quits.

1. Providing sweetened early retirement options.
2. Offering exit incentives (severance pay, etc.).
3. Obtaining valid releases:
 - a. Knowing
 - b. Voluntary
 - c. Valuable consideration
 - d. Older Workers Benefit Protection Act

IV. PRECHECK THE TENTATIVE SELECTION LIST

- A. Check the statistical impact of the RIF on each protected class before and after the RIF
- B. Compare those retained to those let go
- C. Identify potential plaintiffs and weigh their cases carefully scrutinizing the:
 1. Reasons for the choice,

2. Fairness of the reasons,
3. Paper trail in the employee's records,
4. Reasonableness of the decision makers,
5. Confirmation of the choice by other supervisors, and
6. Credibility of potential witnesses

V. CONSIDER OTHER RISK REDUCTION TECHNIQUES

- A. Voluntary Quits (exit incentives)
- B. Adjustments to cure statistical imbalances
- C. Reconsideration of individual cases

VI. CALCULATE THE HIDDEN COSTS

- A. Multi-Employer Pension Plan Act (hidden cost of Union member RIF's where contributions have been made to Union/Employer Multi-Employer Pension Fund)
- B. Worker Adjustment and Retraining Notification Act (60 days notice for mass layoff)
- C. Consider other potential sources of liability
 1. Employment Contracts
 2. Personnel Manual Promise
 3. Pension and Insurance Plan Complications
 4. State Severance Pay Laws

VII. FINALIZE AND EXECUTE THE PLAN

- A. Start with the voluntary quits
- B. Then do the involuntary
- C. Plan the actual termination procedures (who, when, where, etc.)
- D. Rehearse those who will be involved
- E. Be prepared to answer questions which will be raised (e.g. Why me?)

VIII. ACT TO CUT DOWN LIABILITY AFTERWARDS

- A. Consider outplacement counseling
- B. Organize help for terminees to get next jobs
- C. Be sure not to hinder terminees' job search
- D. Refer all government and hostile inquiries to appropriate counsel who will do the job of replying right the first time.

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REDUCTIONS IN FORCE: LEGAL RIGHTS
AND REMEDIES IN DOWNSIZING

PLANNING FOR WORKFORCE REDUCTIONS:
CHARTING A COURSE AROUND THE LEGAL ICEBERGS

by
Fred W. Alvarez
Elena E. Matsis
Pillsbury, Madison & Sutro
San Francisco, CA

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PLANNING FOR WORKFORCE REDUCTIONS:
CHARTING A COURSE AROUND THE LEGAL ICEBERGS

The objective of most reductions in force ("RIFs") is to compete more effectively by cutting labor costs while retaining the most qualified employees. However, in attempting to retain the most qualified employees, employers may incur staggering costs as a result of legal liability. To minimize legal liability and still retain the most skilled employees, employers which are considering workforce reductions must plan ahead.

I. CAREFULLY PLAN FOR A REDUCTION IN FORCE.

Employers can reduce the potential for legal liability stemming from an RIF if the following three issues are carefully considered before taking any action: justifiable selections, prior commitments and required notice.

A. Make Justifiable Selection
Decisions: State and Federal
Statutory Discrimination Claims.

Of key concern to employers is that employees who have been terminated or laid off in a RIF may seek to recover under state or federal anti-discrimination laws.

1. Statutory prohibitions generally.

Federal¹ anti-discrimination statutes protect employees in a number of classes from adverse employment decisions: Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e, et seq., makes it unlawful for an employer to discriminate against an employee on the basis of the employee's sex (including pregnancy), race or national origin²; the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634, as amended by the Older

1 Because state anti-discrimination law is generally guided by federal anti-discrimination law (see, e.g., Stephens v. Coldwell Banker Commercial Group, 199 Cal.App.3d 1394, 1399 (1988)), this article will focus on federal law.

2 One court has found that a United States subsidiary of a Japanese corporation is obligated to comply with Title VII. Fortino v. Quasar Co., 751 F.Supp. 1306 (N.D. Ill. 1990). However, the Supreme Court recently held that a United States corporation operating abroad need not comply with Title VII. EEOC v. Arabian American Oil Co., ___ U.S. ___, 111 S. Ct. 1227, ___ L. Ed. 2d ___ (1991).

Workers Benefit Protection Act ("OWBPA"), Pub.L.No. 101-433, 104 Stat. 973 (Oct. 16, 1990), prohibits discrimination based upon an employee's age; sections 503 and 504 of the Vocational Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796i, prevents discrimination against a qualified employee by federal contractors and recipients of federal financial assistance on the basis of the employee's handicap; and the Americans With Disabilities Act of 1990 ("ADA"), Pub.L.No. 101-336, 104 Stat. 327 (1990), will forbid discrimination against a qualified employee on the basis of the employee's disability³. This article will focus on age discrimination claims because such claims are those most often asserted by employees terminated or laid off in a RIF. Further, employer defenses to age discrimination claims serve to illustrate the importance of making justifiable selection decisions.

2. The ADEA.

The ADEA, as amended by the OWBPA, makes it unlawful to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, including the provision of employee benefits, because of such individual's age. 29 U.S.C. §§ 623(a)(1), 630(1). This prohibition applies to "individuals who are at least 40." 29 U.S.C. § 631(a). Unlawful discrimination on the basis of age may be established through one of two theories of liability: disparate treatment or disparate impact. See, e.g., Rose v. Wells Fargo & Co., 902 F.2d 1417, 1421 (9th Cir. 1990).

a. Disparate treatment.

Proof of disparate treatment requires a showing that the employer intentionally treated some people less favorably than others because of their age. International Bhd. of Teamsters v. U.S., 431 U.S. 324, 335 n.15, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977). Absent direct statements made by the employer which evidence a discriminatory motive, the plaintiff must establish a prima facie case by introducing evidence that he or she was adversely affected by employment decisions under circumstances that give rise to an inference of unlawful discrimination. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981).

3 The ADA's effective date for employers with 25 or more employees is July 26, 1992 and for employers with 15 or more employees is July 26, 1994. Ibid.

Generally, the plaintiff must demonstrate: (1) plaintiff was a member of the protected class (over forty); (2) plaintiff was performing according to the employer's legitimate expectations; (3) plaintiff was terminated or laid off; and (4) plaintiff was replaced by employees not in the protected class. Barnes v. GenCorp Inc., 896 F.2d 1457, 1465 n.9 (6th Cir.), cert. denied, ___ U.S. ___, 111 S. Ct. 211, 112 L. Ed. 2d 171 (1990), citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). However, because the plaintiff is not replaced in cases involving a work force reduction, many circuits require that the plaintiff prove additional direct, circumstantial or statistical evidence tending to indicate that the employer singled out the plaintiff for impermissible reasons in order to make out a prima facie case. See, e.g., Duke v. Uniroyal, Inc., ___ F.2d ___, 1991 WL 42431, at 3 (4th Cir. 1991); Barnes, 896 F.2d at 1465; Rose, 902 F.2d at 1421. Such additional evidence may include a showing that the employer favored younger workers, tended to fire older workers or expressed disfavor toward older workers. Oxman v. WLS-TV, 846 F.2d 448, 455 (7th Cir. 1988); LaGrant v. Gulf & Western Mfg. Co. Inc., 748 F.2d 1087, 1091 (6th Cir. 1984).

If the employer then advances a legitimate nondiscriminatory reason for the action, the plaintiff must demonstrate that the proffered reason was not the true reason for the employment decision. Burdine, 450 U.S. at 256.

b. Disparate impact.

Discriminatory motive need not be shown under the disparate impact theory, which challenges facially neutral employment practices which have a discriminatory impact. Under this theory, the plaintiff must establish a prima facie case by showing specific employment practices responsible for the disparities and statistical evidence which illustrates that the disputed practice caused the exclusion of employees in the protected class. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 995, 108 S. Ct. 2777, 101 L. Ed. 2d 827 (1988). It is interesting to note that some courts have indicated that the relevant statistical pool in determining whether an employee who was terminated in a RIF after his employer merged with another was discriminatory, was all employees in similar positions in the merged corporation. Shutt v. Sandoz Crop Protection, 923 F.2d 722 (9th Cir. 1991).

If the plaintiff meets this burden, the employer carries the burden of producing evidence that its employment practice significantly serves a legitimate goal of the employer. The plaintiff, however, may still prevail if he or she can show that other tests or selection devices would

achieve the employer's objective without the discrimination effect. Watson, 487 U.S. at 986.

c. Other employer defenses.

Generally, selection criteria for a RIF are least suspect when identified and fully documented, nondiscriminatory, job-related and consistently applied. As stated above, in defending against a disparate treatment claim, an employer must articulate a legitimate nondiscriminatory reason for the treatment of older workers, and, in defending against a disparate impact claim, an employer must show a business necessity for the adverse impact a particular selection process has on older workers. In addition, the ADEA provides for four⁴ specific defenses to an age discrimination claim.

i. Bona fide seniority system.

An employer may implement a RIF by terminating those employees with the least seniority first. The ADEA, as amended by the OWBPA, specifically permits an employer to observe the terms of a bona fide seniority system. 29 U.S.C. § 623(f)(2)(A). A seniority system is bona fide if it is not intended to evade the purposes of the ADEA and does not require or permit the involuntary retirement of any individual based upon age. *Ibid*.

ii. Reasonable factors other than age.

Most employers, however, wish to terminate those employees who are relatively poor performers. The ADEA allows an employer to make an employment decision based upon a reasonable factor other than age. 29 U.S.C. § 623(f)(1). In a disparate treatment case, this defense parallels the employer's articulation of a legitimate nondiscriminatory reason for the employment decision. Goetz v. Farm Credit Services, 927 F.2d 398, 399 (8th Cir. 1991). Reasons such as plaintiff's deteriorating performance, plaintiff's inferior performance in relation to those retained or the elimination of plaintiff's position have been held to constitute a legitimate nondiscriminatory reason. See, e.g., Pirone v. Home Ins. Co., 559 F. Supp. 306, 310-11 (S.D.N.Y.), *aff'd*, 742 F.2d 1430 (2d Cir. 1983) (one former employee had been given a series of positions which were graded lower than his prior position, another former employee violated company policy and direct orders from his supervisors, and a third former employee was not completely

4 The ADEA also provides for a fifth defense, a bona fide employee benefit plan, 29 U.S.C. § 623(f)(2)(B), discussed infra, Section II.A.

performing his duties as a senior officer of the company). The lower cost of employing younger workers, however, does not justify excluding older workers. Metz v. Transit Mix, Inc., 828 F.2d 1202 (7th Cir. 1987); 29 C.F.R. § 1625.7(f). But see 20 U.S.C. § 623(f)(2)(B) (an employee benefit plan other than a voluntary early retirement incentive plan may discriminate against older workers based upon cost).

iii. Good cause termination.

In addition, an employer may discharge may otherwise discipline an employee for "good cause," such as unsatisfactory performance or the violation of work rules. 29 U.S.C. § 623(f)(3). See, e.g., Visser v. Packer Engineering Associates Inc., 924 F.2d 655 (7th Cir. 1991) (employee terminated for good cause where disloyal to his employer's chief executive officer).

iv. Bona fide occupational qualification.

Finally, as a last resort, an employer to discriminate against older employees "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business." 29 U.S.C. § 623(f)(1). This defense is extremely narrow because it requires that an employer prove that all or substantially all individuals excluded from the job involved are in fact disqualified or that some of the individuals so excluded possess a disqualifying trait that cannot be ascertained except by reference to age. 29 C.F.R. § 1625.6(b). See, e.g., Western Air Lines v. Criswell, 472 U.S. 400, 105 S. Ct. 2743, 86 L. Ed. 2d 321 (1985) (mandatory retirement of airplane pilots at age 60 not upheld under the bona fide occupational qualification defense).

v. Specific recommendations.

Employers who wish to terminate employees based upon relative performance instead of seniority should take care to ensure that the selection criteria for termination are legally justifiable. The following general advice should be observed. First, identify and fully document the selection criteria. Second, make sure that such criteria do not discriminate against employees based upon a legally protected status. Third, choose criteria which are job-related. Objective criteria for evaluating employee performance are easier to justify in terms of job duties. Fourth, consistently apply the selection criteria. And finally, when assessing relative performance, limit the number of employees being assessed to the smallest group possible because it is easier to justify such decisions.

B. Make Only Those Promises That Can
Be Kept: State Common Law Claims.

Employees who have been laid off or terminated are increasingly adding tort causes of action to try to gain both emotional distress damages and punitive damages. Consequently, it is important for employers to recognize the various tort claims which they may confront as a result of an RIF and to take the appropriate steps to minimize their exposure to such claims. Some examples follow.

1. Fraud and misrepresentation.

a. The elements of fraud.

A plaintiff seeking to recover under a fraud theory must establish six distinct propositions: (1) the defendant made a representation of fact; (2) the representation was false; (3) the defendant knew of the falsity at the time it made the representation or made the representation recklessly or without reasonable ground for believing its truth; (4) the defendant intended to induce reliance upon the representation; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered damages as a result of his reliance.⁵ Kerr v. Rose, 216 Cal.App.3d 1551 (1990).

An employee who has been selected for a RIF may claim that the employer told him or her that it had a policy of terminating only for cause. Additionally, an employee may claim that the employer made false statements with regard to the terms of the RIF. The employee has the burden of showing that such statements were in fact false. See, e.g., Kerr, 216 Cal.App.3d at 1564 (employee failed to state a cause of action for fraud because employer's representations to employee were true, no alternative positions were available and employee would have right to recall for two years).

An employer may also defend against fraud claims by denying that it had any knowledge of the false nature of a statement when it was made and had reasonable grounds for believing its truth. During discovery, plaintiffs will sometimes concede that they have no reason to believe that the person or persons who made the inaccurate statement actually knew or should have known of its falsity. Such an acknowledgment may permit fraud claims to be disposed of by a motion for summary judgment.

5 In addition, in California employees can use California Labor Code § 1050 to make a similar claim.

To establish the element of justifiable reliance, the employee must prove that he or she did something, or refrained from doing something, because of the employer's representation. With respect to representations made prior to or at the inception of employment, a plaintiff typically claims that but for the representation, he or she would have taken a job elsewhere. In the case of statements made during the employment relationship, a worker may assert that had the employer not made the statement, the worker would have resigned.

b. Avoiding fraud claims.

i. The interview process.

All persons involved in the process of interviewing applicants for employment must refrain from making representations concerning certain aspects of the employment relationship. In particular, persons who deal with the job applicants must temper any statements concerning job security, longevity or promotions upon which an employee could later premise a fraud claim. To the extent possible, persons involved in the recruiting and hiring process should also exercise care in making representations concerning the company's financial health or business prospects or layoff policies.

ii. Personnel manual review.

The employer can further minimize the risk of fraud claims by deleting from its personnel manual any assurances which might form the basis of a misrepresentation theory. In addition to removing any statements which might imply that the employer requires cause to terminate an employee, the company should excise or amend any representations dealing with promotions, pay increases, reductions in force and transfers. To the extent the personnel manual covers these topics, it should qualify any discussion by stating that the ultimate decision is in management's unfettered discretion.

iii. Integration clause.

Even if an employer has made representations to an applicant prior to the commencement of employment, it can, to some degree, obviate the legal significance of such representations by including an integration clause in the personnel manual, written employment contract or other material distributed to the employee when he or she commences work. An integration clause essentially provides that the document in which it appears supersedes and extinguishes any and all prior agreements and/or representations between the parties. A comprehensive integration clause should also include a statement that no

future oral representations may alter or add to the terms of employment.

Courts often look to the presence of such a clause to determine whether a fraud claim is viable. For example, in Slivinsky v. Watkins-Johnson Co., the court held that an employee terminated in a RIF failed to state a cause of action for fraud because his reliance on the employer's oral promises of continued employment was not justifiable. 221 Cal.App.3d 799 (1990). The court held that the representation was contradicted by the parties' integrated employment agreement which provided that the contract was at-will. Id. at 806.

iv. Supervisor training.

Supervisors should be trained to use care in motivating employees. On occasion, in their haste to reassure a troubled employee, a supervisor may give unauthorized assurances that if the employee achieves either specific goals or generally improves performance he or she can continue employment. Supervisors should be trained to temper their encouragement and admonitions rather than make such unequivocal promises.

v. Performance incentives.

When extending employment offers, counseling with employees or meting out discipline, employers should not provide forecasts as to future events. Should such forecasts later prove inaccurate or be misconstrued, a dissatisfied employee may use them to support a fraud theory. For instance, an employee during an annual review should not be told that if he or she achieves a certain goal, the employee will definitely receive a promotion. If the employer feels the need to provide the employee with incentives, it should simply state that in order to be considered for a promotion, the employee must accomplish a specific goal.

2. Intentional infliction of emotional distress.

a. The elements of intentional infliction of emotional distress.

To recover for the intentional infliction of emotional distress, a plaintiff must demonstrate that: (1) the defendant's conduct was "outrageous"; and (2) the plaintiff suffered from severe emotional distress as a result of such conduct. The law defines outrageous behavior as that which is so extreme as to exceed all bounds of a civilized community. Cervantez v. J. C. Penney Co., 24 Cal.3d 579, 595 P.2d 975 (1979). An employee who has

been selected for termination in a RIF may assert that the employer behaved outrageously during the implementation of the RIF.

While mere insults or criticisms will not suffice to constitute outrageous conduct, behavior which rises to the level of abusiveness likely will be considered outrageous. Furthermore, whereas a single instance of inappropriate conduct might not by itself be outrageous, repeated occurrences of the same conduct might well support an intentional infliction claim.

When determining whether conduct qualifies as outrageous, the courts look to the manner as well as the substance of the defendant's behavior. For instance, a criticism of an employee delivered in a calm, businesslike manner would not constitute outrageous behavior. The same criticism, delivered by a supervisor shrieking at the top of his voice and gesticulating wildly in the presence of other workers, might qualify as outrageous conduct. Moreover, if the employer knows of an employee's susceptibility to particular conduct and thereafter exploits that susceptibility, the conduct may be deemed outrageous as to that employee, even if it would not be considered outrageous when directed toward the average person. Agarwal v. Johnson, 25 Cal.3d 932, 603 P.2d 58 (1979).

In the employment context, the courts have found a range of employer conduct sufficient to support an intentional infliction claim. Alcorn v. Ambro Engineering, Inc., involved racial epithets shouted at plaintiff by his supervisor. 2 Cal.3d 493, 468 P.2d 216 (1970). In Kelly v. General Telephone Co., the court found that the employer's conduct was outrageous when it accused the employee of falsifying invoices without conducting a reasonable investigation. 136 Cal.App.3d 278 (1982). In Wallis v. Superior Court, the employee was subjected to outrageous conduct when the employer terminated the former employee's monthly furniture payments contrary to an agreement reached in return for the employee's noncompetition. 160 Cal.App.3d 1109 (1984). The employer then lied about the reasons for the termination. Ibid. In Rulon-Miller v. International Business Machines Corp., upheld an intentional infliction award based on a firm's having terminated an employee on the pretext that she had a romantic affair with a competitor's employee. 162 Cal.App.3d 241 (1984). After the employer had told the employee that she had to stop dating the competitor's employee or lose her job, the supervisor told her that he was deciding the matter for her.

Several cases have held that certain workplace conduct did not qualify as outrageous. For example, in Yurick v. Superior Court, an employee failed to show that an employer's frequent comments that people over 40 were liars

and senile were anything more than mere annoyances to the employee. 209 Cal.App.3d 1116 (1989). In Trerice v. Blue Cross of California, the court found that the employer's conduct was not outrageous when the employer gave the employee a termination package which she accepted, withdrew the termination and package, terminated the employee seven days later, presented the employee a second termination package that was less favorable than the original package, and then required the employee to perform receptionist duties until her last day of employment. 209 Cal.App.3d 878 (1989). Similarly, in McGough v. University of San Francisco, the employer's conduct was not outrageous when a former dean informally told a professor that he was qualified for tenure, but then a later administration denied him tenure without warning. 214 Cal.App.3d 1577 (1989).

Mere upset over the defendant's conduct will not suffice to establish severe emotional distress. Instead, plaintiff must show emotional distress of such intensity or duration that "no reasonable man in a civilized society should be expected to endure it." Fletcher v. Western National Life Ins. Co., 10 Cal.App.3d 376, 397 (1970). Thus, an employee who experiences dissatisfaction or some slight degree of anxiety over the employer's conduct could probably not maintain an intentional infliction claim. However, if the employee's emotional condition materially interfered with his or her ability to perform the job or a significant aspect of his or her personal life or caused the employee to seek psychotherapy, a court would likely consider the emotional distress severe.

b. The Workers' Compensation Act as a defense.

Under the California Workers' Compensation Act, an employee's exclusive remedy against his or her employer for injuries occurring within the scope and course of employment is a workers' compensation claim.⁶ Labor Code §§ 3600,

⁶ An employee may not maintain a workers' compensation claim where the injury is caused by: the intoxication of the employee; the intentional conduct of the employee; an altercation in which the employee is the initial physical aggressor; the commission of a felonious act by the employee for which he or she has been convicted; or the voluntary participation in an off-duty recreational activity by the employee. Labor Code § 3600(a).

An employee may maintain a civil action against his or her employer for injuries occurring within the scope and course of employment where such injuries are caused by: a willful physical assault by the employer; the aggravation of
(continued...)

§ 3601. If the employee's injuries arise out of and in the course of employment, the exclusive remedy provisions apply notwithstanding that the injury resulted from the intentional conduct of the employer. Cole v. Fair Oaks Fire Protection Dist., 43 Cal.3d 148, 160, 729 P.2d 743 (1987). This "exclusive remedy doctrine" furthers the "compensation bargain" pursuant to which the employer assumes liability for industrial personal injury or death without regard to fault in exchange for limitations in the amount of that liability. *Id.* at 158.

In Shoemaker v. Meyers, California Supreme Court stated that the exclusive remedy provisions of the Workers' Compensation Act bar other civil actions for damages arising from wrongful employment conduct when: (1) the claimed injury arose out of and in the course of the employment; (2) the claimed injury resulted in substantial physical injury or disability; and (3) the conduct of the employer was work-related and thus was a risk reasonably encompassed within the compensation bargain. 52 Cal.3d 1, 801 P.2d 1054 (1990).

- i. The injury must arise out of and in the course of employment.

It is clear from Shoemaker that an injury occurring during employment, at termination and perhaps even after termination will be considered one arising out of and in the course of employment.

- ii. The claimed injury must result in substantial physical injury or disability.

The Workers' Compensation Act requires only that the claimant sustain an "injury." Labor Code § 3600. Further, the court found that the exclusivity provisions apply when the disability results from emotional, as well as physical, injury. The Court's opinion in Shoemaker, however, suggests that the injury must be "substantial" for the exclusivity doctrine to apply. Considerable litigation will likely result as to whether the plaintiff's emotional or physical injury or disability was "substantial."

6(...continued)

an existing physical injury through the employer's fraudulent concealment of the injury and its connection with the employment; or a defective product manufactured by the employer, sold to a third party and thereafter provided to the employee. Labor Code § 3602(b).

iii. The conduct of the employer is within the normal course of employment.

Shoemaker clearly indicates that when a substantial disability results from termination, a cause of action based on the intentional infliction of emotional distress is viable only when the plaintiff can successfully claim that the employer's conduct was not in the normal course of employment. Conduct outside of the normal course of employment includes conduct which (1) is in violation of an express or implied statutory exception to the Workers' Compensation Act exclusivity provisions; (2) is in violation of public policy; or (3) constitutes fraud or willful physical assault by the employer.

c. Avoiding intentional infliction claims.

Employers can take a number of steps to reduce the risk of intentional infliction claims.

i. Counseling of employees.

Supervisors who are temperamental pose a special risk of intentional infliction claims. If the employer knows a particular supervisor is prone to emotional outbursts, the employer should counsel the supervisor if he or she will be involved in informing the employees selected for the RIF. Such counseling should include explaining to the supervisor that he or she could be personally liable for an intentional infliction claim brought by an aggrieved employee. At a minimum, any incidents of overbearing or abusive behavior should result in a written reprimand placed in the supervisor's personnel file. If found to have merit, the complaints themselves should be documented and placed in the file. Since repeated incidents of temperamental behavior may reflect an underlying psychological problem, reference to an employee assistance program may be appropriate.

ii. Supervisor training.

Supervisors should be trained to always treat employees with reasonable courtesy and respect. While supervisors must sometimes be firm with employees, they should exercise their authority with courtesy and respect and address employees in a calm, professional manner. Unless trained otherwise, some persons may confuse firmness with abusiveness.

C. Give Adequate Notice: The Federal WARN Statute.

Finally, employees who have been terminated or laid off pursuant to a RIF may seek to recover under the Worker Adjustment and Retraining Notification Act ("WARN"), 29 U.S.C. § 2101, et seq., which requires that employers give written notice of a RIF under certain circumstances.

Under the Act, covered employers must give written notice of "mass layoffs" and "plant closures" to "affected employees," the state dislocated worker unit and the local government. If a covered employer fails to give such notice, it may be liable for lost wages and benefits as well as civil fines. Thus it is critical that employers determine: (1) whether they are covered by the Act; (2) which employment actions trigger the Act's requirements; and (3) how to fulfill their obligations under the Act.

1. Covered employers.

WARN applies to business enterprises, including nonprofit enterprises and public entities, employing (a) 100 or more full-time employees or (b) 100 or more full- or part-time employees who, in the aggregate, work at least 4,000 hours per week exclusive of overtime. 29 U.S.C. § 2101(a)(1). The point in time at which the number of employees must be measured for the purpose of determining coverage is the date on which notice is required to be given.

"Full-time" employees include workers on temporary layoff or on leave who have a "reasonable expectation of recall." In determining whether employees have a "reasonable expectation of recall" the courts generally consider the expected length of the layoff and the industry practice. See, e.g., Darmon v. Rob Fork Min. Corp., 739 F. Supp. 341 (E.D. Ky. 1990). "Part-time" employees include employees who work fewer than 20 hours per week or who have been employed fewer than 6 of the 12 months preceding the date on which notice is required under the Act. 29 U.S.C. § 2101(a)(8).

2. Employment actions triggering notice requirements.

a. Plant closings.

The Act requires notice of plant closings, which are defined as "the permanent or temporary shut down of a single site of employment, or one or more facilities or operating units within a single site of employment," where that shut down causes "employment loss" for 50 or more full-time workers during any 30-day period. 29 U.S.C.

§ 2101(a)(2). Notice of temporary shut downs is required if 50 or more employees are terminated, laid off for more than six months, or have their hours reduced by more than 50% per month for any six-month period. 29 U.S.C. § 2101(a)(3).

b. Mass layoffs.

WARN also requires notice of mass layoffs. The Act defines a "mass layoff" as a reduction in force which, during any 30-day period, causes an "employment loss" for 33% of an employer's work force, where that percentage constitutes at least 50 full-time employees. However, where the number of affected workers is 500 or more, the 33% requirement does not apply. 29 U.S.C. § 2101(a)(3).

c. Multiple employment actions.

The notice provisions of the Act will apply where, within any 90-day period, two or more employment losses occur which would not trigger the Act's notice requirements when taken alone, but would if taken in the aggregate. In such a situation, the Act will apply unless the employer is able to demonstrate that the actions resulted from separate and distinct causes, and were not an attempt by the employer to evade WARN's requirements. 29 U.S.C. § 2102(d). Accordingly, employers must look at their past and planned employment decisions through a 90-day rolling window, calculating employment losses for every possible 90-day period during the past 90 and future 90 days.

d. "Employment Loss".

The term "employment loss" is defined as (1) an employment termination, other than a discharge for cause, voluntary departure or retirement; (2) a layoff exceeding six months; or (3) a reduction in individual employees' hours of more than 50% during each month of any six-month period. 29 U.S.C. § 2101(a)(6).

e. "Employees".

Part-time employees are not counted in determining if the plant closure or layoff is large enough to trigger the Act's notice requirements. 29 U.S.C. § 2101(a)(2) and (3).

f. Exemptions.

i. Temporary facilities.

The WARN notice requirement does not apply to temporary employees when the employee was told that his or her employment was to be of limited duration at the time of hire. Even long-term employees may be deemed temporary if

they were hired for a finite job or project. 29 U.S.C. § 2103(1).

ii. Strikes and lockouts.

No notice under WARN is required for strikes and bona fide lockouts. To be bona fide, a strike or lockout must occur in the course of collective bargaining and must not be undertaken to evade the provisions of WARN. An employer need not give notice when permanently replacing a person who is deemed to be an economic striker under the National Labor Relations Act, 29 U.S.C. § 151, et seq. 29 U.S.C. § 2103(2).

iii. Transfers.

WARN finds no employment loss, and therefore no notice requirement, if a plant closure or RIF is a result of relocation or consolidation of the company, and the employer offers a local transfer to the employee. The job must be within reasonable commuting distance, and the worker must experience no more than a six-month break in employment. In addition, no employment loss will be found where an employer offers a transfer beyond "reasonable commuting distance" which the employee accepts within 30 days of the offer or the closing or layoff, whichever is later. 29 U.S.C. § 2102(b)(2).

iv. Employer-sponsored programs.

There is no employment loss, and therefore no notice requirement, where a covered mass layoff or plant closing occurs and the employer transfers or reassigns the employee to an "employee-sponsored program." Examples of such programs include job search activities or retraining. The regulations state, however, that the nature of the reassignment may not constitute "a constructive discharge or other involuntary termination."

3. Notice requirements.

a. Notice to employees.

Once WARN is triggered by one or more employment decisions, 60 days' written notice of the planned RIF or closure must be served upon "affected employees," or their exclusive representative or bargaining agent, if one exists. 29 U.S.C. § 2102(a). The Act defines "affected employees" as "employees who may reasonably be expected to experience an employment loss as a consequence of a proposed plant closing or mass layoff by their employer." 29 U.S.C. § 2101(a)(5). Part-time employees are entitled to the same notice as full-time employees. In addition to notifying those employees who will lose employment due to elimination

of positions, employers must also notify those individuals expected to lose employment due to other factors; due, for example, to the bumping rights of other employees.
29 U.S.C. §§ 2101(a)(5), 2102(a).

Under the Final Regulations issued by the Department of Labor,⁷ if written notice is given to an exclusive representative or bargaining agent it must contain:

- the name and address of the employment site where the plant closing or mass layoff will occur, and the name and telephone number of a company official to contact for further information;
- a statement as to whether the planned action is expected to be permanent or temporary and, if the entire plant is to be closed, a statement to that effect;
- the expected initiation date of and expected schedule for the separation; and
- the job titles of positions to be affected and the names of the employees in those positions.
20 C.F.R. § 639.7(c)(1)-(4).

If there is no representative, notice must be given to each employee. It must be written in plain English, and must include:

- a statement as to whether the planned action is expected to be permanent or temporary and, if the entire plant is to be closed, a statement to that effect;
- the expected date of when the plant closing or mass layoff will commence and the expected date when the individual employee will be separated;
- an indication as whether or not bumping rights exist; and
- the name and telephone number of a company official to contact for further information.
20 C.F.R. § 639.7(d)(1)-(4).

⁷ WARN does not grant enforcement power to the Department of Labor or any other agency. Accordingly, the Department of Labor's regulations are interpretive only and do not have the force and effect of law.

Whether the notice is given to a representative or employee, the regulations state that the notice statement should also include additional information useful to the employees such as information on available dislocated worker assistance, and, if the planned action is expected to be temporary, the estimated duration, if known. Ibid.

b. Notice to state.

WARN also requires that employers give 60 days' written notice of plant closures and RIFs to what it has termed "dislocated worker units." Individual states are to create these units. Until such units are created, service on the governor is required. Notice to the state must contain:

- the name and address of the employment site where the plant closing or mass layoff will occur, and the name and telephone number of a company official to contact for further information;
 - a statement as to whether the planned action is expected to be permanent or temporary and, if the entire plant is to be closed, a statement to that effect;
 - the expected initiation date of and anticipated schedule for the separations;
 - the job titles of positions to be affected, and the number of employees in such positions;
 - an indication as whether or not bumping rights exist; and
 - the name of each union representing affected employees, along with the name and address of the chief elected officer of each such union.
- 20 C.F.R. § 639.7(e)(1)-(6).

The regulations also provide for an alternative form of notice to the State Dislocated Worker Unit. Instead of filing a written notice containing the above six elements, an employer may give a condensed notice containing the name and address of the affected site, the name and telephone number of a company official to contact for further information, the expected date the separations will begin, and the number of affected employees. Information regarding the other elements must then be kept on-site and readily accessible to the State Dislocated Worker Unit, and to the appropriate unit of general local government. Should this information not be available when requested, it will be deemed to be a failure to give required notice. 20 C.F.R. § 639.7(f).

c. Notice to local government.

Notice of employment actions governed by WARN must also be given to the local government. This notice, to be served on the chief elected local official, must contain the same elements as the notice to the State Dislocated Worker Unit. As with notice to the Dislocated Worker Unit, the regulations also provide for condensed notice to the local government in the manner outlined above. Ibid.

d. Rolling notice.

The regulations explicitly state that "rolling notice" will not constitute compliance under the Act. An example of rolling notice would be an employer which routinely gives notice in each paycheck envelope of impending RIFs or layoffs, whether or not such actions were actually contemplated.

e. Shortened notice.

Under certain circumstances, an employer may order a plant closing (but not a mass layoff) and need only provide "as much notice as is practicable" and not the 60 days as normally required. Shortened notice is permissible if the employer falls under the "faltering company" exception, encounters unforeseeable business circumstances or encounters a natural disaster. 29 U.S.C. § 2102(b). When the shortened notice is given, it must contain a statement as to why it is for less than 60 days.

4. Other considerations.

a. Corporate reorganizations.

WARN provides that, where a business or part of a business is being sold, the seller is responsible for giving notice of a RIF or plant closing up to and including the effective date of transfer. 29 U.S.C. § 2101(b). The regulations state that the seller, "if so empowered" as an agent of the buyer, may give notice of a RIF or plant closing which is planned for within 60 days after the transfer. However, ultimate responsibility for such notice remains with the buyer.

Because proper allocation of responsibility for WARN notice may not always be clear in the transfer of business context, disputes between buyers and sellers may arise. To avoid such disputes, the buyer and seller should reach agreement between themselves as to how any required notice will be given prior to the sale.

b. Collective bargaining agreements.

WARN provides that it does not supersede collective bargaining or employment agreements which may provide for more extensive notice rights. The WARN notice period runs concurrently with the final 60 days of any contractual or collective bargaining agreement notice period. 29 U.S.C. § 2105.

II. CONSIDER ALTERNATIVES TO A
REDUCTION IN FORCE.

To avoid the above liability issues which a RIF presents, employers may consider whether workforce needs can be met by some method of downsizing other than a RIF. Such methods may include job sharing, reduced working hours, or a voluntary early retirement or severance plan. Early retirement and severance plans, however, must be carefully structured to avoid liability under the ADEA and the OWBPA. Further, any accompanying waiver of claims must be precisely crafted in order to exclude age discrimination claims under the OWBPA.

A. Early Retirement and Severance
Plans.

The ADEA, as amended by the OWBPA, specifically permits an employer to observe the terms of a bona fide employee benefit plan, such as an early retirement or severance plan. 29 U.S.C. § 623(f)(2)(B). An employee benefit plan is bona fide in the following circumstances: (1) the plan is a voluntary early retirement incentive plan; or (2) the employer can prove that benefits under the plan cost more for older workers than for younger workers and the plan otherwise meets the requirements of the Equal Employment Opportunity Commission's regulations, 29 C.F.R. § 1625.10(a)(2). Ibid. However, employee benefit plans continue to be unlawful if they discriminate on the basis of age in areas of employment that are not related to benefits. Ibid. Accordingly, a voluntary early retirement plan may not limit benefits to younger employees and justify excluding older employees simply because they would soon be retiring anyway.

In addition, the OWBPA specifically provides that requiring a minimum age for normal or early retirement benefits, and providing subsidized early retirement benefits and providing social security supplements under a defined benefit pension plan are nondiscriminatory. 29 U.S.C. § 623(k). In addition, the legislative history of the Act suggests that flat dollar amount incentives, enhancements tied to years of service, enhancements based on percentage of salary or pension and imputed additions to age and or other service are also permissible.

Further, severance payments to pension-eligible employees at the time of a RIF may be reduced only by the following. First, severance payments may be reduced by the value of retiree health benefits provided to pension eligible retirees, if the package is comparable to Medicare for employees under 65, and one-fourth the value of Medicare benefits for those over age 65 less individual contributions. And second, additional pension benefits, called "sweeteners," may be subtracted. Further, disability benefits may be reduced by pension benefits that are not attributable to employee contributions if the employee voluntarily elects pension benefits or has attained the normal retirement age or 62. 29 U.S.C. § 623(k).

B. Waiver of Claims.

Further, termination incentives which are contingent upon recipients signing a general release or covenant not to sue must meet very specific requirements in order to be enforceable with respect to age discrimination claims. Under the OWBPA, an individual may not waive any right or claim unless the waiver is knowing and voluntary. 29 U.S.C. § 626(f)(1). At minimum this means that:

- the waiver must be written in a manner calculated to be understood by the average individual eligible to participate, 29 U.S.C. § 626(f)(1)(A);
- the waiver must specifically refer to rights or claims under the Act, 29 U.S.C. § 626(f)(1)(B);
- the waiver may not waive rights or claims that arise after the date it is executed, 29 U.S.C. § 626(f)(1)(C);
- the individual receives consideration in addition to anything of value to which he or she is already entitled, 29 U.S.C. § 626(f)(1)(D);
- the individual is advised in writing to consult an attorney, 29 U.S.C. § 626(f)(1)(E);
- the individual is given 21 days to consider the waiver, 29 U.S.C. § 626(f)(1)(F)(i); and
- the waiver provides for a seven-day period for revocation. 29 U.S.C. § 626(f)(1)(G).

Where the waiver is in settlement of a charge filed with the Equal Employment Opportunity Commission ("EEOC") or an action filed in court, the individual need only be given a "reasonable period of time" to consider the agreement and

need not be given time to revoke the agreement. 29 U.S.C. § 626(f)(2).

In addition, if the waiver is requested in connection with an exit incentive program, the individual's affected must be given 45 days to consider the waiver, 29 U.S.C. § 626(f)(1)(F)(ii), and must be given the following information at the beginning of such period:

- the class, unit or group of individuals covered by the program;
- the eligibility factors and time limits of the program;
- the job titles and ages of all individuals selected for participation in the program; and
- the job titles and ages of all individuals not selected for participation in the program.
29 U.S.C. § 626(f)(1)(H)(i) and (ii).

The party asserting the validity of a waiver has the burden of establishing that the waiver was knowing and voluntary. 29 U.S.C. § 626(f)(3).

PROGRAM ELIMINATION, FINANCIAL EMERGENCY, AND STUDENT RIGHTS

STEVEN GLENN OLSWANG*

ELSA KIRCHER COLE**

JAMES B. WILSON***

Colleges and universities are facing extreme financial difficulties due to inflation, state and federal budget cuts, and enrollment declines. Reduced appropriations and income along with increased costs are forcing many institutions to reexamine their program offerings to decide which programs should be continued and which should be eliminated.

While concern in these retrenchment situations normally focuses on the faculty involved and the effects on tenure rights, little has been written on the rights of students enrolled in programs slated for elimination. This article will address both the rights of students to complete programs into which they have matriculated and the obligations of colleges and universities to maintain these programs for sufficient periods of time to fulfill any existing contracts with students.

STUDENT/UNIVERSITY RELATIONSHIP

In recent years there has been much discussion concerning the legal relationship between the university and its students. In recent literature and case law there appears to be some consensus that a contractual relationship exists between the student and the university. This contractual relationship has been variously described as an implied—or quasi—contract,¹ with the specific terms being derived from a variety of sources

* B.A., Northwestern University, 1968; J.D. University of Illinois, 1971; Ph.D. University of Washington, 1977. Assistant Provost for Academic Affairs, University of Washington. Lecturer, Area of Higher Education, College of Education, University of Washington.

** A.B., Stanford University, 1971; J.D. Boston University, 1974. Assistant Attorney General, University of Washington.

*** B.A., University of Washington, 1948; LL.B. University of Washington, 1950. Senior Assistant Attorney General, University of Washington. President, National Association of College and University Attorneys, 1979-80.

¹ For a thorough discussion of contract theory applied in the student-university relationship, see Nordin, *The Contract to Education: Toward a More Workable Theory of the Student-University Relationship*, 8 J. COLL. & U.L. 141 (1981-82); Ray, *Toward Contractual*

which include college bulletins, internal rules, and oral statements made to students on which they could reasonably rely.² A description of the contract that is formed between an institution and a student, and cited by courts as authoritative,³ is found in an early Notre Dame Law Journal Note:

This contract is conceived of as one by which the student agrees to pay all required fees, maintain the prescribed level of academic achievement, and observe the school's disciplinary regulations, in return for which the school agrees to allow the student to pursue his course of studies and be granted a diploma upon the successful completion thereof. Since a formal contract is rarely prepared, the general nature and terms of the agreement are usually implied, with specific terms to be found in the university bulletin and other publications; custom and usages can also become specific terms by implication.⁴

This contract relationship theory has been applied by courts in matters involving admission criteria;⁵ tuition charges and changes;⁶ disciplinary procedures and dismissals;⁷ expulsion for academic reasons;⁸ and the requirements for the awarding of a degree.⁹ The courts have applied this contract theory to both private and public universities.¹⁰ However, the courts have been clear in holding that such

Rights for College Students, 10 J. L. & Ed. 163 (April 1981); Jennings, *Breach of Contract Suits by Students Against Postsecondary Education Institutions: Can They Succeed?* 7 J. COLL. & U.L. 191 (1980-81).

² Lowenthal v. Vanderbilt University, No. A8525, slip op. (Chancery CT., Davidson Co., Tenn. Aug. 15, 1977).

³ Peretti v. Montana, 464 F. Supp. 784, 786 (D. Mont. 1979), rev'd. on other grounds, 661 F.2d 756 (9th Cir. 1981).

⁴ Note, *Expulsion of College and Professional Students—Rights and Remedies*, 38 NOTRE DAME LAW JOURNAL 174, 183 (1962).

⁵ Steinberg v. Chicago Medical School, 69 Ill. 2d 320, 371 N.E.2d 634 (1977).

⁶ Basch v. George Washington Univ., 370 A.2d 1364 (D.C. Ct. App. 1977).

⁷ Swanson v. Wesley College, 402 A.2d 401 (Del. Super. Ct. 1979); Kwiatkowski v. Ithaca College, 82 Misc. 2d 43, 368 N.Y.S.2d 973 (Sup. Ct. 1975); Carr v. St. Johns Univ., 12 N.Y.2d 802, 187 N.E.2d 18 (1962).

⁸ Jansen v. Emory Univ., 440 F. Supp. 1060 (N.D. Ga. 1977), aff'd, 579 F.2d 45 (5th Cir. 1978); Balogun v. Cornell Univ., 70 Misc. 2d 474, 333 N.Y.S. 2d 838 (Sup. Ct. 1971).

⁹ Lexington Theological Seminary v. Vance, 596 S.W.2d 11 (Ky. Ct. App. 1979); DeMarco v. Univ. of Health Sciences, 40 Ill. App.3d 474, 352 N.E.2d 356 (1976); Olsson v. Bd. of Higher Educ., 49 N.Y.2d 408, 402 N.E.2d 1150 (1980); Healy v. Larsson, 35 N.Y.2d 653, 318 N.E.2d 608, 360 N.Y.S.2d 419 (1974).

¹⁰ In Healy v. Larsson, 323 N.Y.S.2d 625, aff'd, 35 N.Y.2d 653, 318 N.E.2d 608, 360 N.Y.S.2d 419 (1974), a case in which a student sought a degree award based on courses taken on a guidance counselor's recommendation, the court said: "It has been held that when a student is duly admitted by a private university, there is an implied contract between the student and the university that if he complies with the terms prescribed by the university he will obtain the degree which is sought." (Carr v. St. John's Univ., 17 A.D.2d 632, 231 N.Y.S.2d 410, aff'd, 12 N.Y.2d 802, 235 N.Y.S.2d 834, 187 N.E.2d 18 (1962)). There is no reason why this principle should not apply to a public university or community college." 323 N.Y.S.2d at 626.

contracts are subject to change¹¹ and that strict commercial law contract applications are inappropriate:

It is apparent that some elements of the law of contracts are used and should be used in the analysis of the relationship between plaintiff and the University to provide some framework into which to put the problem of expulsion for disciplinary reasons. This does not mean that "contract law" must be rigidly applied in all its aspects. . . . The student-university relationship is unique, and it should be and cannot be stuffed into one doctrinal category. . . . There are also many cases which refer to a contractual relationship existing between the student and the university. . . . But again, these cases do not adopt all commercial contract law by their use of certain elements.¹²

Just as courts have found contract principles useful in analyzing particular aspects of the student/university relationship, those same principles must be considered in evaluating the mutual obligations of the parties with regard to the continued existence of an entire area of academic study. Thus, when a student enrolls in a particular degree program, there is an implied contract that the student will be able to receive the degree sought if he/she successfully completes the academic requirements formulated by the institution.¹³ The student's contractual expectation, however, may conflict with an institution's right to manage its resources or set its educational curriculum.

Like the tenure contract for faculty, the student enrollment contract is a form of property interest. As such, under the fourteenth amendment, it cannot be impaired by a state-supported institution of higher education without first providing appropriate due process protections to the students.¹⁴ Thus, the student-university relationship is not only an enforceable contract, under state law, but in state-supported institutions it takes on the form of a constitutionally protected property interest.

¹¹ *Mahavongsanan v. Hall*, 529 F.2d 448, 450 (5th Cir. 1976). In this case, the court affirmed the validity of academic degree requirement changes during a student's enrollment stating: "The appellee's claim of a binding, absolute, unchangeable contract is particularly anomalous in the context of training professional teachers in postgraduate level work." In *Peretti v. Montana*, 464 F. Supp. 784, 786 (D. Mont. 1979), rev'd on other grounds, 661 F.2d 756 (9th Cir. 1981), a case involving students' claims for damages as a result of the elimination of a vocational training program, the court states concerning implied terms in a contract of enrollment: "Certainly in the period of time between a student's matriculation and graduation, an educational institution, which is a living, changing thing, may not reasonably be expected to remain static, and conversely, change may reasonably be expected. Hence, each statement in a publication of what now is true does not necessarily become a term in the contract between the school and the student."

¹² *Slaughter v. Brigham Young Univ.*, 514 F.2d 622, 626 (10th Cir. 1975).

¹³ *Eden v. Bd. of Trustees*, 49 A.D.2d 277, 374 N.Y.S.2d 686 (N.Y. App. Div. 1975); *Galton v. College of Pharmaceutical Sciences*, 70 Misc. 2d 12, 332 N.Y.S. 2d 909 (N.Y. Sup. Ct. 1972); *Peretti*, supra note 3.

¹⁴ *Infra* note 41.

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PROGRAM ELIMINATIONS AND FINANCIAL EMERGENCY

The elimination of academic programs within colleges and universities can be justified on one (or both) of two grounds: educational policy or financial emergency. While most program eliminations take place "in the face of some financial difficulty," program eliminations need not be forced by financial retrenchment.¹⁵ It is perfectly valid for a governing board to eliminate a program of study on solely educational policy grounds, e.g., lack of faculty expertise, lack of library volumes in the particular area, permanent reductions in enrollment, or similar reasons. "The board of trustees has the jurisdiction to make the policy determination of the continued existence of the various departments within the university."¹⁶ Indeed, even the American Association of University Professors, in its Recommended Institutional Regulations on Academic Freedom and Tenure,¹⁷ recognizes that a faculty member's appointment may be terminated, notwithstanding his/her tenure or contract right, as a result of the elimination of a program or department for reasons other than financial emergency:

Discontinuance of a Program or Department Not Mandated by Financial Exigency

(d) Termination of an appointment with continuous tenure, or of a probationary or specified appointment before the end of the specified term, may occur as a result of bona fide formal discontinuance of a program or department of instruction. . . . The decision to discontinue formally a program or department of instruction will be based essentially upon educational considerations. . . .¹⁸

Eliminations of programs for educational policy reasons, not primarily prompted by financial crises, are normally accomplished in a phase-out structure, with presently enrolled students being allowed to complete their programs of study. When these eliminations begin to reflect financial decisions rather than educational policy decisions, the necessity to eliminate programs mounts more quickly, and the potential for adversely affecting student contract or constitutional rights increases.

When an institution's budgetary crisis warrants the declaration of a financial emergency,¹⁹ program eliminations under the auspices of that

¹⁵ Dougherty, *What is the Most Effective Way to Handle Program Discontinuance?* CURRENT ISSUES IN HIGHER EDUCATION: ASSESSMENT, 25-34, Washington, D.C.: AAHE (1979).

¹⁶ Behrend v. State, 55 Ohio App.2d 135, 140, 379 N.E.2d 617, 621 (1977).

¹⁷ 62 AAUP Bulletin, 184-191 (Summer, 1976).

¹⁸ *Id.* at 187. The AAUP states that "educational considerations do not include cyclical or temporary variations in enrollment. They must reflect long-range judgments that the educational mission of the institution as a whole will be enhanced by the discontinuance."

¹⁹ The AAUP defines a "financial exigency" as: "An imminent financial crisis which threatens the survival of the institution as a whole and which cannot be alleviated by less drastic means." AAUP, Recommended Institutional Regulations, *supra* note 17, at 186.

emergency must be seriously considered. The essence of a financial emergency is that sufficient funds are unavailable to support all programs within an entire institution and that programs and related faculty need to be eliminated.²⁰ Time is of the essence in financial emergencies, and the luxury of slowly phasing out programs disappears as a result of the necessity to reduce expenditures immediately.

In reviewing a decision to eliminate academic programs based on a declaration of financial emergency, the courts have required that the financial crisis be "bona fide," and will inquire into the basis for such financial decisions, particularly where they impair a contract or constitutionally protected property right, such as tenure.²¹ In examining the finances to be taken into account to determine whether a financial emergency is bona fide, courts have focused on whether current or projected expenditures exceed operating revenues, without regard to endowment or capital accounts.²² Once a court is satisfied a valid financial emergency exists, it generally will not substitute its judgment for that of the institutional governing board on where cuts should be taken or on which programs should be eliminated:

Where there is a showing that the administrative body, in exercising its judgment, acts from honest convictions, based upon the facts which it believes for the best interests of the school, and there is no showing that the acts were arbitrary or generated by ill will, fraud, collusion, or other such motives, it is not the province of a court to interfere and substitute its judgment for that of the administrative body.²³

Despite the authority of governing boards to eliminate programs and dismiss related faculty for financial or educational reasons, questions have been raised about the authority of governing boards to prevent, through such eliminations, enrolled students from completing their degree requirements. In fact, the cases that have addressed the question of a student's right to complete the program into which he/she has matriculated seem to limit, to some extent, the governing board's authority over program eliminations.

The terms "financial exigency" and "financial emergency" are often used interchangeably; nevertheless, the authors believe that only when an emergency situation arises mandating an immediate crisis response can an institution legally alter the terms of an existing contract, such as tenure. The term "financial emergency" will therefore be used as an apt description of the situation under discussion.

²⁰ For a thorough discussion of relevant cases involving faculty terminations in financial emergency situations, see Tucker, *Financial Exigency—Rights, Responsibilities and Recent Decisions*, 2 J. COLL. & U.L. 103 (1974), in conjunction with Wilson, *Financial Exigency: Examination of Recent Cases Involving Layoff of Tenured Faculty*, 4 J. COLL. & U.L. 187 (1976).

²¹ *AAUP v. Bloomfield College*, 346 A.2d 615 (N.J. 1975).

²² *Id.* at 617; *Krotkoff v. Goucher College*, 585 F.2d 675, 681 (4th Cir. 1978).

²³ *Levitt v. Bd. of Trustees*, 376 F. Supp. 945, 950 (D. Neb. 1974).

STUDENT RIGHTS TO COMPLETE PROGRAMS

Few cases involving students' rights to complete programs which are scheduled for elimination have been reported, and none has been reported where a program was to be eliminated as a result of a "formal" financial emergency declaration. However, an analysis of the existing cases provides some good indications of the responsibility of institutions to students caught in such predicaments.

In *Eden v. Bd. of Trustees*,²⁴ fifteen students admitted as members of the first class of a newly planned School of Podiatric Medicine in the Health Sciences Center at the State University of New York at Stony Brook complained, on breach of contract grounds, that the school would not open as planned and that they would not be allowed to enroll at the previously scheduled time. The enrollment deferment resulted from the need for the system to reduce its expenditures in light of a \$25,000,000 reduction in the school's state appropriations. While no formal "financial exigency" was declared, the action was judicially viewed as a response to a "fiscal crisis."²⁵

Recognizing that the "acceptance of the petitioners' applications (for admission) satisfies the classic requirements of a contract,"²⁶ the court went on to hold that the abrogation of the contract by the state, in deferring the enrollment, was arbitrary and capricious. The basis for this finding was the testimony given by University officials that no money would be saved by not enrolling the students at the planned time. The courses to be offered podiatric medicine students in their first year were going to be offered regardless of the school's failure to open due to the course requirements of students entering other health sciences schools.

The reasoning of the court, however, makes it clear that had savings been made by such an administrative action, the matter might have been viewed differently.

We recognize that the judicial branch of the State must exercise restraint in questioning executive prerogative, especially where budgetary and fiscal problems may require elimination or curtailment of State-provided services. However, we are not foreclosed from examination of the issue of whether the abrogation of the contract here would indeed save money.²⁷

Further, since it was made apparent from the evidence that a savings would occur in future years, the court limited its ruling to the entering class. "We make no decision and express no opinion as to the rights of the petitioners as to any period beyond the 1975-1976 academic year."²⁸

²⁴ 49 A.D.2d 277, 374 N.Y.S.2d 686 (1975).

²⁵ *Id.* at 282, 374 N.Y.S.2d at 691.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 284, 374 N.Y.S.2d at 693.

While some students availed themselves of the opportunity to attend the first-year courses, others did not. The School of Podiatric Medicine was closed and never opened. The students sued the state again, this time for monetary damages, because of their inability "to pursue a four-year course of study and to obtain a degree of Doctor of Podiatric Medicine."²⁹ The Court of Claims held, however, that no breach of contract resulted after the first year, and the students received an adequate remedy for that year. Further, the court held that the waiver by the state of its immunity had never been extended

to redress individual wrongs which may result from an error of judgment by an officer of the State in the performance of his duty involving a function that is intrinsically governmental, sovereign in character, and completely foreign to any activity that is, or could be carried on by a private person. (Citations omitted). The court concludes, therefore, that notwithstanding the fact that the State incurred a contractual obligation to enroll the claimants in SPM for the academic year 1975-1976, and that the State acted arbitrarily and capriciously in failing to so enroll the claimants, it may not be held in damages for its action.³⁰

In *Galton v. College of Pharmaceutical Sciences, Columbia University*,³¹ students (faculty and alumni as well) brought suit against the College—an independently incorporated affiliate of Columbia University—and the University to compel the continuation of the pharmaceutical sciences program. The University had notified all concerned of its intention to close the College due to lack of finances at the end of the present academic year.

The court, in requiring a full trial on the merits, found that the students had standing to challenge the University's decision to close the college because of the adverse impact on the students. "Students presently attending the College should not be preemptorily cast out of the College, and their education interrupted for an indefinite time, perhaps forever, if such action is arbitrary."³² While pointing out that "there is some obligation upon the part of the college to permit the student to continue his studies to graduation if willing and eligible to continue,"³³ the court recognized that there were circumstances which could justify the elimination of the program and the voiding of the students' rights to complete the program. "Of course, if circumstances beyond the control of the College, such as lack of finances, prevent the College from continuing, the issue is concluded."³⁴ The court, however, reserved the right to "in-

²⁹ *Eden v. State*, 103 Misc. 2d 461, 464, 426 N.Y.S. 2d 197, 199 (Ct. Cl. 1980).

³⁰ *Id.* at 465-66, 426 N.Y.S.2d at 200.

³¹ 70 Misc. 2d 12, 332 N.Y.S.2d 909 (Sup. Ct. 1972).

³² *Id.* at 14, 332 N.Y.S. 2d at 912.

³³ *Id.* at 15, 332 N.Y.S. 2d at 912 [citing *Ryan v. Hofstra Univ.*, 68 Misc. 2d 890, 328 N.Y.S. 2d 339 (Sup. Ct. 1971) and *Carr v. St. John's Univ.*, 34 Misc. 2d 319, 231 N.Y.S.2d 403 (Sup. Ct. 1962)].

³⁴ 332 N.Y.S.2d at 912.

quire into the basis of the determination,"³⁵ in other words, to determine if the financial crisis necessitating the closure of the School was bona fide.

Interestingly, the court drew a distinction between the rights of enrolled students to challenge the validity of the financial basis for closure and the right of the College not to admit additional students. The court, finding the College to "have made a prima facie showing of financial distress"³⁶ permitted the College not to admit future classes of students. This distinction is important in that while admitted and enrolled students have a protectable contract interest in preventing the closure, the court recognized that future students not yet admitted have no basis to compel their admission. Thus, prospective closures, preventing future admissions, are not likely to be successfully challenged by persons desiring to be admitted.

In another similar case, *Peretti v. Montana*,³⁷ the Board of Public Education of the State of Montana eliminated the Aviation Technology Program at the Missoula Technical Center, one of five vocational education centers maintained by the Board, due to reduced legislative appropriations. The program had an integrated curriculum requiring six consecutive quarters of work, completion of which would lead to eligibility for a private pilot's license and other employment opportunities in the general aviation industry. As a result of the program's elimination, students with only three quarters completed were not able to finish the remaining quarters of work and sued the state for damages since the "three quarters' training [was] of dubious value to them."³⁸

The federal district court rejected arguments by the state that the federal court lacked jurisdiction over this matter on eleventh amendment grounds and found the state had waived its immunity from suit.³⁹ On the students' claims, the court held that "[t]here seems to be almost no dissent from the proposition that the relationship is contractual in nature"⁴⁰ between the student and college, and that such an "implied contract is within the 14th Amendment's protection. . . ."⁴¹ Since "there was a violation of a right protected by the Constitution" by the "act of an administrative body making the exercise of the right impossible,"⁴² a federal question existed. The court went on to find, on the subject of

³⁵ *Id.*

³⁶ *Id.* at 16.

³⁷ *Peretti v. Montana*, 464 F. Supp. 784 (D. Mont. 1979).

³⁸ *Id.* at 786.

³⁹ *Id.* at 788.

⁴⁰ *Id.* at 786.

⁴¹ *Id.* at 787. The court cited *Bd. of Regents v. Roth*, 408 U.S. 564 (1972) and *Perry v. Sindermann*, 408 U.S. 593 (1972) as the basis for its holding. "Without doubt [liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract" *Roth* at 572, and such a contract may be expressed or implied. *Perry* at 601-02.

⁴² *Id.* at 788.

remedies, that since the program was already terminated, the State of Montana was liable to the students for damages.⁴³

On appeal, the award of damages was reversed by the federal appeals court as the state was found immune from liability under the eleventh amendment.⁴⁴ Because the State did not consent to its being sued in federal court, the appeals court did not have to reach the "merits of the district court's holding that the termination of the program denied students a due process right."⁴⁵ Nonetheless, the reasoning of the district court is consistent with the theory that the student/university relationship is a contract and that such contract is an interest protected in public institutions by the Constitutional requirement of due process.

The foregoing cases seem to confirm that while institutions, due to legislatively imposed or otherwise created financial problems, may eliminate programs, students' contractual rights give them the standing to challenge the "bona fides" of the financial crisis. Where the financial problem is not, in a court's mind, sufficiently bona fide to warrant the program elimination, such action will be deemed arbitrary and, as in *Eden*,⁴⁶ students will be permitted to continue in the program. Yet even where a board may properly eliminate a program, liability for damages to students for violation of their due process rights or breach of contract may still result, though the matter of governmental immunity from suit may foreclose actual recovery from state institutions.

An institution also may be held liable for its failure to maintain the quality of a program during its phase-out period. In *Behrend v. State*⁴⁷ students enrolled in the state university's School of Architecture sued for failure of the university to support the program of study to a level where it would be accredited. Even though at the time of the students' enrollment the School was not accredited, representations by School officials that it would be again accredited, and efforts by the School to have the accreditation commission visit the School, were inferred by the court to be part of the implied contract between the School and the students. "[T]here was an implied contract by Ohio University with these student plaintiffs that the latter be provided accredited academic training. . . ."⁴⁸

Because of "a significant decrease in student enrollment and rather severe budget constraints,"⁴⁹ a policy decision was made by the university to allocate resources to other units in the College of Fine Arts (which included the School of Architecture) and to phase out the School of Architecture. This action resulted in the accreditation commission

⁴³ *Id.*

⁴⁴ *Montana v. Peretti*, 661 F.2d 756 (9th Cir. 1981).

⁴⁵ *Id.* at 759.

⁴⁶ *Eden*, *supra* note 24.

⁴⁷ 55 Ohio App.2d 135, 379 N.E.2d 617 (1977).

⁴⁸ *Id.* at 140, 379 N.E.2d at 621.

⁴⁹ *Id.* at 136, 379 N.E.2d at 619.

withdrawing any proposed favorable action. Students in the program were permitted to complete their programs and graduate, "if they so desired." While recognizing that "[t]he development and continuation of the university's courses of study should reside within the sound discretion of the university's board of trustees and administrative officials,"⁵⁰ the court said the effects of those decisions on others must be considered.

[W]here a determination is made affecting those with whom the university has contracted, unless there is shown to be an impossibility of performance, the contract must be fulfilled, or damages awarded. Here, instead of showing an impossibility of performance, Ohio University proved that the College of Fine Arts, and then the board of trustees of the university, made a selection of academic goals and that the other departments in the College of Fine Arts were chosen to continue rather than the School of Architecture.⁵¹

Thus, the court accepted the authority of the board to make such program elimination choices, not necessitated by a financial emergency, but found that if in so doing contracts with students were violated, damages would be an appropriate remedy. The damages that such students could recover due to failure of accreditation included the loss of transferable credit, the additional time and expense necessary to make up those credits, pecuniary loss due to the necessity to transfer to another accredited school, and loss resulting from delay in qualifying for state licensure exam.⁵²

In another case dealing with program deterioration, *Lowenthal v. Vanderbilt University*,⁵³ several students admitted to a newly established doctoral program in management sued the university for the disintegration—or defacto elimination—of the program. No financial crisis was alleged by the university as a basis justifying its actions toward the program. After finding that a contractual relationship existed between the school and the students,⁵⁴ the court found that not only the administration, but the program's faculty⁵⁵ failed in their duty to adhere to the obligations created by the contract. That obligation, said the court, consisted of providing "a high quality academic training leading to an academically acceptable doctoral degree which may be earned by the satisfaction of reasonable and consistent standards and procedures. The

⁵⁰ *Id.* at 141, 379 N.E.2d at 621.

⁵¹ *Id.* at 140, 379 N.E.2d at 621.

⁵² *Id.* at 141, 379 N.E.2d at 621.

⁵³ No. A8525, slip op. (Cnancery Ct., Davidson Co., Tenn. Aug. 15, 1977).

⁵⁴ *Id.* at 16. The court found that the terms of the contract consisted of the school's catalogue, the Graduate School guidelines for graduate study, and the oral representations by faculty and administration.

⁵⁵ "Even the written documents which helped compose the contract were not followed by the GSM faculty." *Id.* at 17.

University must provide the resources necessary to accomplish this end."⁵⁶

In finding breach of contract on the part of the university, the court focused in substantial part on the fact that the institution failed to fund the program to the degree necessary to make it work. This failure had an adverse impact on the university's duty to perform under the contract and resulted in its liability to the students.

Vanderbilt University enjoys a tradition and reputation for excellence and quality in higher education. In a sharp departure from this tradition, Vanderbilt hastily embarked upon a vague and ill-defined doctoral studies program when it knew or should have known that it did not have the resources to operate the program. Vanderbilt received something of value from these plaintiffs and gave little or nothing in return. The university must bear the responsibility for its conduct.⁵⁷

The court noted the students' wasted time and effort in the defunct program and assessed damages against the institution for the actual out-of-pocket expenses of the students: tuition, interest on loans to pay tuition, duplicating and typing costs. While the court recognized that in some instances loss of future earning capacity might be a proper measure of additional damages, none were proved in this case.⁵⁸

SUMMARY AND CONCLUSION

There appears to be a consensus among the courts that a contractual relationship exists between a student and his or her university upon matriculation. The precise terms of the contract involve an appreciation of the various bulletins, handbooks, oral communications delivered from institutional representatives and faculty, prior custom, and practice.

Contract principles are applied in protecting a student's right to complete degree programs. Once a student is admitted to a degree program, he/she has an enforceable expectation that the institution will continue that program for the length of time normally necessary for the student to graduate. While courts recognize that the university is not a "static,"⁵⁹ but a "living changing thing,"⁶⁰ program eliminations which may breach the contract between a university and its students will be subject to review by the courts and consequent damages may be awarded.

This contractual relationship, furthermore, translates into a constitutional right of students when the college with which they contract is a

⁵⁶ *Id.* at 16.

⁵⁷ *Id.* at 42.

⁵⁸ *Id.* at 37-41. The total damages to the eight former students was \$24,087 plus interest.

⁵⁹ *Peretti*, *supra* note 11, 464 F. Supp. at 787.

⁶⁰ *Id.*

state institution. The contract becomes an interest protected from abridgment without due process of law. What process might be due a student enrolled in a program targeted for elimination has not been discussed by the courts. Certainly the institutional review process possibly leading to a program's elimination should permit the participation of affected students.

Yet institutions have the inherent right to discontinue programs for strictly financial reasons or for reasons involving educational policy whether or not related to resource reallocation decisions. And while the authority rests with a governing board to make program elimination decisions, the obligation to continue students already enrolled in those programs does not cease. An exception to this student continuation obligation is where there is an "impossibility of performance,"⁶¹ thus justifying the full abrogation of the student/university contract.

The *Galton*⁶² case represents such an impossibility of performance situation, but it is suspect for its general applicability. Because the College of Pharmaceutical Sciences was an independently incorporated institution, its financial failure would have resulted in its going out of business. In most cases of bona fide financial emergency, choices are made by central administrations about which program will be discontinued. This administrative choice decision may not satisfy the "impossibility" requirement, for it could well be argued that sufficient cost savings could be accomplished elsewhere in the institution short of those which result in the violation of students' contractual rights. So while governing boards can eliminate programs because of financial emergency, as they can for educational policy reasons, it is likely that presently matriculated students cannot be "cast out" without resulting liability. In other words, new classes of students do not have to be admitted, but enrolled students have through their contracts with the university a right to continue.

This is not to say, however, that enrolled students must, in all instances, be allowed to continue through graduation if the program is slated for elimination. It appears that if the circumstances warranting its prospective elimination are bona fide, the program could be eliminated without having to let all students presently enrolled graduate as long as sufficient continuation time is provided them to ensure no damages will accrue. The program should be continued for a sufficient length of time to permit students a reasonable opportunity to transfer to a similar program elsewhere without suffering a credit loss or a postponement of their graduation date. Practically speaking, however, this continuation period may well equal the length of time it would take the normal student to graduate.

Furthermore, care must be taken to ensure that the quality of the pro-

⁶¹ *Behrend*, *supra* note 47, 55 Ohio App. 2d at 140, 379 N.E.2d at 621.

⁶² *Supra* note 31.

gram slated for elimination does not significantly decline during any phase-out period. As in *Behrend*,⁸³ if the program is accredited, that accreditation status should be maintained during any phase-out period so as to ensure that the students finishing the program are not damaged.

The anomaly in this situation is that students may have greater contractual rights to complete their programs than tenured faculty have to retain their jobs if programs are eliminated in a financial emergency. Even though the AAUP in its Financial Exigency Guidelines⁸⁴ recommends that a faculty member removed due to financial emergency be given at least one year's notice before removal, courts have upheld 30 day notices of termination.⁸⁵ Students, however, except in a clear institutional closure situation, are likely to be able to complete their programs.

While the university-student relationship is indeed unique, it does not vest a university with unlimited power to do as it pleases without facing the consequences.⁸⁶

⁸³ *Supra* note 47.

⁸⁴ *On Institutional Problems Resulting From Financial Exigency: Some Operating Guidelines*, 60 AAUP BULLETIN 267-68 (Summer 1974).

⁸⁵ *Klein v. Board of Higher Educ. of New York*, 434 F. Supp. 1113 (S.D.N.Y. 1977).

⁸⁶ *Lowenthal*, *supra* note 53, at 42.

TO SAVE A COLLEGE: INDEPENDENT COLLEGE TRUSTEES AND DECISIONS ON FINANCIAL EXIGENCY, ENDOWMENT USE, AND CLOSURE

*EDWARD A. JOHNSON

**KENT M. WEEKS

INTRODUCTION

During the past decade, events have precipitated legal examination of many areas of college and university governance. That examination has centered on the changing relationships among various campus constituencies, governing bodies, and courts of law. Institutional governance issues relating to the role of faculty, students, and unions have received prominent attention. But there has been very little research and commentary on the legal rights, responsibilities, and duties of the trustees that ultimately govern independent colleges or universities.

It is clear that issues surrounding the legal authority of boards of trustees will be increasingly litigated in the courts. Austere economic times for higher education and the fiscal distress some independent colleges and universities encounter will force their boards to justify responses seeking to cure fiscal crises such as faculty layoffs, department closures, and corporate structure changes. Legal issues appear to be shifting from the clarification of those internal constituent roles defined during a period of generous resource allocations in the 1960's to the clarification of the roles of those who will participate in this decade's struggles over assessments of the economic viability of institutions facing severe revenue shortfalls. To date only a few reported court cases evolving from lawsuits

* Law Clerk, Hon. George B. Nielsen, Jr., United States Bankruptcy Court, District of Arizona; Faculty Associate, Department of Higher and Adult Education, Arizona State University; B.S. 1973, Morningside College; J.D. 1976, Creighton University; Ph.D., 1984, Higher Education Administration, Arizona State University.

** Weeks, Turner and Anderson, Nashville, Tennessee; B.A. 1959, College of Wooster; M.A. 1961, University of New Zealand; Fulbright Scholarship; LL.B. 1964, Duke University; Ph.D. 1969, Case Western Reserve University. The author is also a Professor of Education at Peabody College, Vanderbilt University.

challenging financial decisions by trustees of nonprofit corporations provide a road map for boards and their legal counsel. Even fewer of these decisions specifically focus on challenges to trustees' decisions on matters of declaring financial exigency, termination of tenured faculty, diverting restricted endowment income or principal for other purposes, and merger or closure. Accordingly, the legal terrain in which trustees must make these decisions is unclear.

The purpose of this article is to examine the major legal issues surrounding trustee financial exigency decisions, the fiduciary duties of trustees to preserve net institutional assets, and potential trustee liability for a decision to close an institution prior to bankruptcy. The analysis and conclusions derive from an examination of the legal status of colleges and universities and their trustees, conflicting fiduciary theories dealing with actions or failures to act, and developing law on exigency decisions.

I. THE LEGAL STATUS OF THE INDEPENDENT COLLEGE AND TRUSTEE

A. Corporate Status of a College

The corporate status of the independent college is vested in the governing body—the board of trustees (directors, regents, curators, or other title)—which holds legal title to the property,¹ and possesses the powers granted by the legal instrument which created the institution.² The most

¹ The founding of an independent, degree-granting college or university can only be accomplished in accordance with the law of the state in which the institution is located. The vast majority of such entities are incorporated as nonprofit corporations under state statutes. "[T]he incorporation of trustees under a charter which confers upon them . . . the full power of management of the property and of the institution, diverts such right of the founder, and vests it, as well as the absolute title to the property conveyed, in the corporation." Trustees of Union Baptist Ass'n. v. Huhn, 7 Tex. Civ. App. 249, 250, 26 S.W. 755, 756 (1894). See also, NEW YORK NOT-FOR-PROFIT CORP. LAW § 513(a) (McKinney Supp. 1982) which states that trustees own the assets. This codifies St. Joseph's Hosp. v. Bennett, 281 N.Y. 115, 22 N.E.2d 305 (1939). Courts have historically demanded a corporate structure capable of accepting and holding property. As early as 1819 the United States Supreme Court would not uphold a bequest to an association that was not incorporated at the time of the death of the testator. Trustees of Philadelphia Baptist Ass'n v. Hart's Ex'rs, 17 U.S. (4 Wheat.) 1 (1819).

² Because a corporation has historically been defined as a collection of individuals united by authority of law into one body and empowered to act in many respects like an individual, this "artificial" notion implies that the corporation has only such purposes and powers as are statutorily conferred upon it. See, e.g., ARIZ. REV. STAT. ANN. § 10-1028 to 1032 (1983), and CAL. CORP. CODE §§ 5110-6910, 7110-8910, 9110-9690 (West 1981). A nonprofit corporation has been historically defined as one that is barred from distributing its net earnings to individuals who exercise control over it. The prohibition is usually found in the conditions of the charter and the incorporation statutes. See ALI-ABA MODEL NONPROFIT CORP. ACT §§ 2(c), 26 (1964). Of course, not all educational enterprises need be nonprofit. See Hansmann, *Reforming Nonprofit Corporation Law*, 129 U. OF PA. L. REV. 497, 545-47 (1981).

common founding procedure used for the vast majority of colleges, the charter, denotes the charitable purposes for which the institution is permitted to exist.³

Unless the charter is limited or revoked, a nonprofit corporation is generally deemed to have perpetual existence. Basic powers must be exercised only as a corporate body and not as individuals, and these powers are always subject to the charter, federal and state constitutions, and the state laws where the corporation resides.⁴ Typically the powers include the right to utilize a corporate name, to sue or be sued, to make contracts, to purchase and hold property, to have a corporate seal, to make bylaws, and include the implied power to act reasonably in carrying out express purposes. In addition, courts have recognized certain powers in an academic context, including the right to eliminate departments,⁵ to approve cost-reduction programs,⁶ to determine admission standards,⁷ to reduce faculty salaries,⁸ to hire and terminate employees,⁹ to eliminate degree

³ "The statement of purposes in the articles results in defining the scope of authorized corporate activity and limits the powers of the corporate officers and agents and is controlling over the powers. . . ." *House of Rest of the Presbyterian Church v. Los Angeles County*, 151 Cal. App. 2d 523, 525, 312 P.2d 392, 394 (1957). The landmark case of *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819) established the concept of the institutional charter as the controlling focal point defining the purposes of the institution and its relationship to the courts, the state and the public. See also, e.g., *Burnett v. Barnes*, 546 S.W.2d 744 (Mo. Ct. App. 1977); *Leeds v. Harrison*, 9 N.J. 202, 206, 87 A.2d 713, 717 (1952); *Frank v. Clover Leaf Park Cemetery Ass'n*, 29 N.J. 193, 148 A.2d 488 (1959); *Bertram v. Berger*, 1 Ill. App. 3d 743, 274 N.E. 2d 667 (1971); *Healy v. Loomis Inst.*, 102 Conn. 410, 128 A. 774 (1925); *In re Antioch Univ.*, 418 A.2d 105, 113 (D.C. Cir. 1980).

⁴ The other procedures are by state constitution, state legislature, or taxing district actions. See *St. Bridget Convent Corp. v. Town of Milford*, 87 Conn. 474, 88 A. 881 (1913); *Good Will Home Ass'n v. Erwin*, 266 A.2d 218 (Me. 1970). The charter is also called the articles of incorporation in some states, with the same result that state approval is issued in the form of a charter. General charitable purposes have historically included the advancement of education, the relief of poverty, the promotion of health, a government or municipal purpose and the promotion of some other purpose beneficial to the community. See, e.g., MASS. GEN. LAWS ANN. ch. 180, § 4 (West 1981). Generally these purposes are stated as broadly as possible, so as to avoid *ultra vires* problems (acts beyond the scope of powers of a corporation) and the necessity for subsequent amendment of the certificate of incorporation to include additional purposes.

⁵ *Foley v. Benedict*, 122 Tex. 193, 55 S.W.2d 805 (1932); *Searle v. Regents of the Univ. of Cal.*, 23 Cal. App. 3d 448, 100 Cal. Rptr. 194 (1972).

⁶ *Anderson v. Board of Trustees of Community College Dist. No. 526*, 56 Ill. App. 3d 937, 372 N.E. 2d 718 (1978).

⁷ *Foley*, 122 Tex. 193, 55 S.W.2d 805.

⁸ *Northern Wyoming Community College Dist. v. Nipps*, 582 P.2d 83 (Wyo. 1978).

⁹ *Jimenez v. Almodovar*, 850 F.2d 363 (1st Cir. 1981); *Bellak v. Franconia College*, 118 N.H. 313, 386 A.2d 1266 (1978); *Worzella v. Board of Regents of Educ. of State*, 77 S.D. 447, 93 N.W.2d 411 (1958); *Sittler v. Board of Control of Michigan College of Mining & Technology*, 333 Mich. 681, 53 N.W.2d 681 (1952).

programs,¹⁰ and to alter retirement policies.¹¹

Corporate bylaws, developed by the board following approval of the charter, describe the operation of the institution and the corporate board. Certain powers can be delegated, such as curricular design or student counseling, although ultimate responsibility rests with the board. Other responsibilities--such as faculty appointments, presidential selection, and degree granting--may not be delegable. Legal liability of trustees for these decisions is also limited under the corporate organization. In the absence of fraud, gross negligence, or misdealing, trustees are not individually liable for the obligations of the corporation.¹²

B. Duties of Trustees

One of the earliest fundamental principles guiding trustees of true trusts and colleges was the notion of the fiduciary. Derived from the Latin "fiduciarius," which in the Civil Law denoted one in a position of trust, the concept entered the common law system through the courts of equity. The term is used as a concept as well as a label, because the nature and function of a trust relationship characterizes the extent of the fiduciary's duties. The essence of a true trustee's fiduciary relationship is his or her responsibility to deal with the trust property "for the benefit of" the trust beneficiary. Indeed under the language of the Restatement (Second) of Trusts, "[t]he trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary."¹³

¹⁰ *Moore v. Board of Regents of Univ. of N.Y.*, 89 Misc. 2d 23, 390 N.Y.S. 2d 582 (1977), *aff'd*, 59 A.D.2d 44, 397 N.Y.S. 2d 449 (1977), *aff'd*, 44 N.Y. 593, 407 N.Y.S.2d 452, 378 N.E.2d 1022 (1978).

¹¹ *Rehor v. Case Western Reserve Univ.*, 43 Ohio St. 2d 224, 331 N.E. 2d 416 (1975), *cert. denied*, 423 U.S. 1018 (1975).

¹² See HENDRICKSON AND MANGUM, *GOVERNING BOARDS AND ADMINISTRATOR LIABILITY*, ERIC/HIGHER EDUCATION RESEARCH REPORT NO. 9 (Washington, D.C.: American Association for Higher Education, 1977).

¹³ *RESTATEMENT (SECOND) OF TRUSTS* § 170(1) (1959). Justice Benjamin Cardozo's observation represented the high expectations of early judicial pronouncements regarding the fiduciary duties of true trustees:

Many forms of conduct permissible in a workaday world for those acting at arm's length are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions (citation omitted). Only thus has the level of conduct for fiduciaries been kept at a higher level than that trodden by the crowd.

Meinhard v. Salmon, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928).

However, Justice Felix Frankfurter's observation belies the legal uncertainties that confuse judges, lawyers, and trustees: "[T]o say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations?" *Securities and Exchange Comm'n v. Chenery Corp.*, 318 U.S. 80, 85-86 (1943).

Historical roots of charitable organizations have served to blur distinctions among true trusts, nonprofit corporations, and business corporations. Because charitable organizations, such as colleges, were established with donations of property, courts initially often applied traditional fiduciary rules from trust law in examining college trustee behavior. More recently the majority of courts have begun to apply fiduciary standards from corporation law and have tended to compare the nature of the modern college to that of the business corporation. The result has been a series of seemingly disjointed cases that have made it difficult for trustees and their attorneys to predict judicial judgment.¹⁴

A corporate director has two basic fiduciary duties: a duty of care and a duty of loyalty. The duty of care has been defined as an obligation to act in a corporate capacity in good faith and with the degree of diligence, care, and skill which ordinary prudent persons would exercise under similar circumstances.¹⁵ Essentially the standard has been fashioned into one allowing delegation of specific functions while retaining the role of an overseer. The so called "business judgment rule" protects the corporate director against liability for a mere error of judgment.¹⁶ The outcomes of cases applying the rule are determined by whether the board acted reasonably in gathering the facts necessary for a decision and whether the facts were given sufficient consideration. A recent case expresses the philosophy of the rule:

It appears to us that the business judgment doctrine, at least in part, is grounded in the prudent recognition that courts are ill equipped and infrequently called on to evaluate what are and must be essentially business judgments. The authority and responsibilities vested in corporate directors both by statute and decisional law proceed on the assumption that inescapably there can be no available objective standard by which the correctness of every corporate decision may be measured, by the courts or otherwise. Even if that were not the case, by definition the responsibility for business judgments

¹⁴ Cases applying trust law standards include: *California v. Larkin*, 413 F. Supp. 978 (N.D. Cal. 1976); *Queen of Angels Hosp. v. Younger*, 66 Cal. App. 3d 359, 136 Cal. Rptr. 36 (1977); *Lynch v. John M. Redfield Found.*, 9 Cal. App. 3d 293, 88 Cal. Rptr. 86 (1970); *Holt v. College of Osteopathic Physicians & Surgeons*, 61 Cal. 2d 750, 394 P.2d 932, 40 Cal. Rptr. 244 (1964); *Brown v. Memorial Nat'l. Home Found.*, 162 Cal. App. 2d 513, 329 P.2d 118 (1958), cert. denied, 358 U.S. 943 (1959).

Cases applying the corporate standard include: *Stern v. Lucy Webb Hayes Nat'l Training School for Deaconesses and Missionaries*, 381 F. Supp. 1003 (D.D.C. 1974); *Denckla v. Independence Found.*, 41 Del. Ch. 247, 193 A.2d 538 (1963); *In re Myra Found.*, 112 N.W.2d 552 (N.D. 1961); *Beard v. Achenbach Memorial Hospital Ass'n.*, 170 F.2d 859 (10th Cir. 1948); *City of Paterson v. Paterson Gen. Hosp.*, 97 N.J. Super. 514, 235 A.2d 487 (1967); *Ray v. Homewood Hosp.*, 223 Minn. 440, 27 N.W.2d 409 (1947).

¹⁵ For a list of cases, see W. CARY, *CASES AND MATERIALS ON CORPORATIONS* 50-59 (4th ed. abr. 1970) and H. HENN, *HANDBOOK OF THE LAW OF CORPORATIONS* 454-55 (2d ed. 1970).

¹⁶ The rule was first recognized in the United States in *Percey v. Millaudon*, 8 Mart. (n.s.) 68 (La. 1829).

must rest with the corporate directors; their individual capabilities and experience peculiarly qualify them for the discharge of that responsibility.¹⁷

The duty of loyalty requires the director to act solely in the interest of the corporation and to forego conflicts of interest.¹⁸ Typical examples of breach of this duty include competing with the corporation, usurping corporate opportunities, self-dealing, and repression of minority stockholders. Failure to disclose conflicts renders any given transaction avoidable, but directors may still complete the transaction after learning of a conflict.

*Stern v. Lucy Webb Hayes National Training School for Deaconesses and Missionaries*¹⁹ is the leading case applying corporate standards of care and loyalty to trustees of nonprofit corporations. In a class action suit by patients at a nonprofit hospital, the court upheld a breach of trust claim against the hospital trustees for failure to properly supervise the management of the hospital's assets. Federal District Court Judge Gesell based his ruling on the observation that while the charitable corporation was a relatively new legal entity which did not fit into established common law categories of corporation and trust, the modern trend was to apply corporate rather than trust principles in determining the liability of directors of charitable corporations. He further stated that for personal liability the corporate director must commit "gross negligence" or otherwise be guilty of more than mere mistakes in judgement.²⁰

The corporate fiduciary standard was also used to analyze the trustees' supervision of investments. The judge ruled that a trustee of a nonprofit corporation breached his fiduciary duty to manage the fiscal and investment affairs of the corporation if he otherwise failed to perform his duties honestly, in good faith, and with a reasonable amount of diligence and care.²¹ Although containing a paucity of supporting theory, the case has been cited by commentators as a leading example of an emerging application of corporate fiduciary standards to nonprofit corporations.²²

¹⁷ *Auerbach v. Bennett*, 47 N.Y.2d 619, 630-31, 393 N.E.2d 994, 1000, 419 N.Y.S.2d 920, 926-27 (1979). A reading of various cases shows a judicial philosophy of also desiring not to unduly stifle free enterprise. The lack of successful suits by stockholders speaks to the success of the rule from a board member's standpoint.

¹⁸ For a list of cases, see W. CARY, *supra* note 15, at 50-59.

¹⁹ *Stern*, 381 F. Supp. 1003.

²⁰ *Id.* at 1013.

²¹ *Id.* at 1015.

²² See, e.g., Comment, *Divestiture Resolutions: University Director Liability Under the Emerging Corporate Standard*, 15 U.S.F.L. Rev. 261 (1980-81) and Marsh, *Governance of Non-Profit Organizations: An Appropriate Standard of Conduct for Trustees and Directors of Museums and Other Cultural Institutions*, 85 Dick. L. Rev. 607 (1981). The *Stern* case was followed by *Midlantic Nat'l Bank v. Frank G. Thompson Found.*, 170 N.J. Super. 128, 405 A.2d 866 (1979). The Uniform Management of Institutional Funds Act also is in accord. See 7A UNIFORM LAWS ANNOTATED, 405, 407, 409 note 66 (1978) exemplified by CAL. CIV. CODE § 2290.1-2290.12 (West 1981).

The alternative set of stricter fiduciary standards applied by courts comes from traditional trust law principles.²³ Under trust law, the duty of care for a true trustee is expressed in terms of the prudent man rule whereby the trustee is "under a duty to the beneficiary in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his or her own property. . . ."²⁴ The true trustee is a fiduciary of the highest order,²⁵ and liability can be found for breach of duty of care under a simple negligence standard, as contrasted with the "gross negligence" standard characterizing the corporate duty. The true trustee must be cautious in investment policies and must administer the trust solely for the benefit of its beneficiaries.²⁶ Self-dealing is prohibited, and the trustee is liable for any loss the trust suffers through negligence.²⁷

II. THE INDEPENDENT COLLEGE TRUSTEE AND FINANCIAL STRESS

The legal concepts of a college as a nonprofit corporation and college trustees as fiduciaries with prescribed duties apply principally to the control of institutional assets and are an initial focal point for uncertain exigency-related duties. Legal issues arising from severe financial crises are also concerned with the college's charter and its impact on trustee actions. The fundamental issues in times of confrontation have generally focused on the ultimate right of the board of trustees to declare a state of financial exigency and terminate tenured faculty, to reallocate assets in times of financial crises, to close the institution, and on the potential rights of non-trustees to intervene in those decisions.

A. Financial Exigency: An Evolving Standard of Fiduciary Duties

Higher education may be in the midst of a long term economic turmoil resulting from declining enrollments, changing student interests, and shifting governmental support.²⁸ Terminations of tenured faculty in response

²³ A trust is defined as a relationship with respect to property, by which the technical owner agrees to administer property for the benefit of another. RESTATEMENT (SECOND) OF TRUSTS § 2 (1959); 1 SCOTT, THE LAW OF TRUSTS § 2-2.8 (3d ed. 1967 & Supp. 1982). For example, in a charitable trust, a donor might deposit \$100,000 in a bank and stipulate that the interest was to be given to a charity for scholarships. The bank is the trustee for the res (trust property) and the charity is the beneficiary of the trust and holds equitable title in the trust. The beneficiaries need not be identifiable individuals in a charitable trust.

²⁴ RESTATEMENT (SECOND) OF TRUSTS § 174 (1959) and G. BOGERT & G. BOGERT, TRUSTS AND TRUSTEES § 612 (1978).

²⁵ *In re Trusteeship of Stone*, 138 Ohio St. 293, 298, 34 N.E.2d 755, 760 (1941).

²⁶ RESTATEMENT (SECOND) OF TRUSTS § 379 (1959).

²⁷ G. BOGERT & G. BOGERT, *supra* note 24 at § 543.

²⁸ Quantifiable signs of exigency are becoming more evident. Layoffs of tenured faculty are one early sign. See, e.g., *A Roundup on Layoffs: Faculty Cuts and Related Actions at 17 Colleges*, CHRON. HIGHER EDUC., December 8, 1982, at 23. Many colleges are delinquent in paying federal construction debts. See, e.g., *U.S. Finds 79 Colleges Delinquent in Paying Construction Debts*, CHRON. HIGHER EDUC., July 28, 1982, at 9.

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to institutional financial pressures have resulted in legal confrontations.²⁹ A clearer definition of financial exigency and a standard for the fiduciary duties of independent college trustees may be emerging from court decisions and position statements by groups such as the American Association of University Professors (AAUP).

Prior to the evolution of financial exigency case law, the AAUP issued recommended policies for financial exigency declarations through a series of statements.³⁰ While standard definitions and procedures for financial exigency continue to be ultimately a matter of contract, standard tenure clauses in many institutional faculty contracts and handbooks reflect the language from these documents. The AAUP 1940 Statement of Principles on Academic Freedom and Tenure³¹ describes tenure and termination as follows:

- (a) After the expiration of a probationary period, teachers or investigators should have permanent or continuous tenure, and this service shall be terminated only for adequate cause, except in the case of retirement for age, or under extraordinary circumstances because of financial exigencies . . .
- (5) termination of a continuous appointment because of financial exigency should be demonstrably bona fide.³²

This statement has been utilized by courts as a two-part test examining exigency related layoffs. A single reference to the dual role of a faculty committee and the governing board in considering a termination appeal

²⁹ Lawsuits are even being filed prior to the implementation of financial exigency regulations or policies developed by boards. See, e.g., *Council of N.J. State College Locals, NJSFT-AFT/AFL-CIO v. State Bd. of Higher Educ.*, 91 N.J. 18, 449 A.2d 1244 (1982).

³⁰ There has been a great deal of commentary examining the relationship between academic tenure and layoffs of faculty. The research has not examined the impact of the resultant layoff-related court cases and the clarification of fiduciary duties. See Bolger & Wilmoth, *Dismissal of Tenured Faculty Members for Reasons of Financial Exigency*, 65 MARQ. L. REV. 347 (1982); Finkin, *Regulation by Agreement: The Case of Private Higher Education*, 65 IOWA L. REV. 1119 (1980); Gray, *Higher Education Litigation: Financial Exigency*, 14 U.S.F.L. REV. 375 (1980); Johnson, *The Problems of Contraction: Legal Considerations in University Retrenchment*, 10 J. L. EDUC. 269 (1981); Matheson, *Judicial Enforcement of Academic Tenure: An Examination*, 50 WASH. L. REV. 597 (1975); Note, *The Dismissal of Tenured Faculty for Reasons of Financial Exigency*, 51 IND. L. J. 417 (1976); Note, *Financial Exigency as Cause for Termination of Tenured Faculty Members in Private Post Secondary Educational Institutions*, 62 IOWA L. REV. 481 (1976).

³¹ *Academic Freedom and Tenure: 1940 Statement of Principles and Interpretive Comments*, A.A.U.P. BULL., Summer 1974 at 269. The document is also found in JOUGHIN, *ACADEMIC FREEDOM AND TENURE: A HANDBOOK OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS* (1969). The term financial exigency is also found in the 1925 CONFERENCE STATEMENT OF ACADEMIC FREEDOM AND TENURE but is not defined. See *Academic Freedom and Tenure*, A.A.U.P. BULL., February 1941 at 43.

³² *Academic Freedom and Tenure: 1940 Statement of Principles and Interpretive Comments*, A.A.U.P. BULL., Summer 1974 at 270. Moral turpitude and incompetence are noted as possible grounds under dismissal for "adequate cause." No definition was offered for "demonstrably bona fide."

was the only mention by the 1940 Statement of the role of the board in such determinations.³³

The 1976 revisions of the AAUP's Recommended Institutional Regulations on Academic Freedom and Tenure provided the final major AAUP recommended proposal.³⁴ In this document a demonstrably bona fide financial exigency was defined as "an imminent financial crisis which threatens the survival of the institution as a whole and which cannot be alleviated by less drastic means."³⁵ This definition has been characterized as the "survival standard."

Many board members do possess reservations concerning the definitions and procedures outlined by the various AAUP documents. However, courts continue to consider those recommended policies in determining the relationship between ongoing college and university practices and legal elements of tenure, and due process procedures surrounding dismissals and exigency declarations,³⁶ particularly if the proposals are part of faculty handbooks and contracts.

Beginning in the 1970's, the courts examined the AAUP statements on financial exigency. In *American Association of University Professors*

³³ In the 1958 Statement on Procedural Standards in Faculty Dismissal Proceedings the A.A.U.P. provided further elaboration on the 1940 Statement. The 1958 Statement recommended that the governing body should receive, review and act upon a recommendation of a faculty hearing committee established to consider challenges to grounds of adequate cause for a tenured faculty member's dismissal. If the board did not approve of the hearing committee's decision, it was proposed in the Statement that the board should not overrule that decision until the hearing committee was given an opportunity for reconsideration. See Joughin, *supra* note 31, at 40.

³⁴ 1976 Recommended Institutional Regulations on Academic Freedom and Tenure, A.A.U.P. BULL., Summer 1976 at 184.

³⁵ *Id.* at 186. In addition the A.A.U.P. recommended that a faculty body should participate in the decision on whether a condition of exigency exists or is imminent, and determine that all feasible alternatives to terminations have been pursued. Furthermore, the A.A.U.P. asserted that the burden of proving the existence and extent of the condition rests with the college, and that generally, nontenured members should be dismissed prior to tenured faculty. To provide certain protection to faculty, the A.A.U.P. recommended that the institution should make every effort to place the dismissed faculty member in another suitable position and that the faculty member's place should not be filled by a replacement within a period of three years unless the terminated faculty member is offered reinstatement.

³⁶ Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law, rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). See also *Perry v. Sindermann*, 408 U.S. 593 (1972); *Greene v. Howard Univ.*, 412 F.2d 1128 (D.C. Cir. 1969). In the absence of an express tenure and due process clause in the faculty contract, courts will utilize state laws, institutional by-laws, faculty handbooks, A.A.U.P. documents and ongoing institutional practices. Far-sighted legal counsel will advise institutions to have an explicit financial exigency clause in the standard faculty contract.

v. *Bloomfield College*,³⁷ the board of trustees of Bloomfield College voted to terminate thirteen faculty members pursuant to a declaration of financial exigency. The remainder of the faculty were put on one-year terminal contracts. The faculty handbook contained verbatim the 1940 Statement. At trial, the college introduced evidence of declining enrollment, a three year cash deficit, a shrinking endowment, borrowing problems, and cash flow problems. The faculty challengers argued that since the college owned a valuable golf club property which the trustees did not sell, the trustees failed to exercise good faith in their decision to dismiss tenured faculty.

The trial judge acknowledged the poor financial condition of the college but noted several options to restore short term economic viability, including the potential sale of the golf club property. The judge adopted the "survival standard" proposed by the AAUP³⁸ and noted that the good faith of the college board could be demonstrated by a showing that the dismissal of tenured personnel was reasonably calculated to preserve the college's existence as an academic institution. The following test was employed:

The test best suited to effectuate the intent of the parties on judicial review of the college's action, therefore, is whether the action taken followed from the board's demonstrably bona fide belief, under honestly formulated standards, in the existence of a financial exigency and extraordinary attendant circumstances, and in the necessity for terminating tenured faculty members as a means of relieving the exigent condition. Interrelated therewith is the question of whether sufficient credible evidence of "exigency" and "extraordinary circumstances" exists as to provide a basis for the conclusions reached in the exercise of a reasonable and prudent judgment.³⁹

The judge commented that he did not have the authority to substitute his judgment for that of the trustees, that the trustees had the best insight and wisdom, and that it was not for the court to decide whether the survival of the college remained "possible" by the choice of other courses of action. Nonetheless the court seemed to substitute its judgment for that of the trustees in ruling for the dismissed faculty members. Questioning the board's failure to sell the golf course and noting that twelve professors had been rehired during the time the dismissals took place, the court found

³⁷ *American Ass'n of Univ. Professors v. Bloomfield College*, 129 N.J. Super. 249, 322 A.2d 846 (1974), *aff'd*, 136 N.J. Super. 442, 346 A.2d 615 (1975).

³⁸ It [tenure] should be vigilantly protected by a court of equity except where . . . the survival of the college is imperiled, and then only where the good faith of the administration in seeking the severance of tenured personnel has been clearly demonstrated as a measure reasonably calculated to preserve its existence as an academic institution . . . (and not simply) in some degree advance the financial fortunes of the institution.

Bloomfield College, 129 N.J. Super. at 257, 322 A.2d at 854. See 1976 *Recommended Institutional Regulations on Academic Freedom and Tenure*, *supra* note 34, at 186.

³⁹ *Bloomfield College*, 129 N.J. Super. at 267, 322 A.2d at 855.

that abolishing tenure was a stronger motive for the dismissals than dealing with financial exigency. Accordingly, the court held that the college had failed to show its actions were in good faith.

On appeal the Appellate Division of the Superior Court of New Jersey upheld the decision of the trial court based upon the evidence of bad faith shown by hiring of additional faculty during the time period when tenured faculty were released. As a result of its analysis of the board's fiduciary standards, however, the court held that the trial judge erred in his use of the potential sale of the club as a basis for finding that the financial exigency condition was not bona fide. The appellate court held that whether a particular plan of action is preferable to secure financial stability is a policy decision to be made by the institution and not by a judge.⁴⁰ The court found substantial evidence that a bona fide financial exigency condition existed at Bloomfield College--satisfying the first part of the AAUP test⁴¹--and that a "state of urgency" was a more reasonable construction of the term financial exigency. However, the board had failed part two of the AAUP test by not showing that the relationship between the financial condition and the faculty terminations was bona fide. Both parts of the test, adopted by the court and contained in Bloomfield's faculty handbook, followed guidelines offered by the AAUP's 1940 Statement and 1958 Statement with respect to the relationship of termination to a bona fide exigency. However the court did not adopt the "survival standard" eventually enumerated in the 1976 Statement.⁴²

*Scheuer v. Creighton University*⁴³ further demonstrated that courts were rejecting the AAUP "survival standard." The university terminated an assistant professor on the grounds of a financial exigency in the School of Pharmacy, due in part to the loss of federal funds. The school had run deficits for five years, even though numerous cutbacks had been implemented prior to Scheuer's termination. The court held that the termination was properly based on a bona fide reduction in a program of instruction. It rejected Scheuer's argument that financial conditions at the University did not approximate the AAUP "survival standard":

The rapidly changing needs of students and society demand that university administrators have sufficient discretion to retrench in areas faced with financial problems. . . . To sustain it [professor's position] we must hold no tenured employee in any college may be released until the institution exhausts its total assets or at the very least reaches the point where its very survival as an institution is in jeopardy.⁴⁴

⁴⁰ "The trial judge recognized that the exercise of the business judgment whether to retain or sell this valuable capital asset was exclusively for the board of trustees and not for the substituted judgment of the court." *Id.* 346 A.2d at 617.

⁴¹ See *supra* note 32 and accompanying text.

⁴² The trial court established a "survival of the college is imperiled" standard. The court seemed to equate this phrase with "preservation of its existence as an academic institution." *Bloomfield College*, 322 A.2d at 854.

⁴³ *Scheuer v. Creighton Univ.*, 199 Neb. 618, 260 N.W.2d 595 (1977).

⁴⁴ *Id.* at 624, 260 N.W.2d at 601.

Thus the court held that the term financial exigency could be limited to an exigency in a department or a college and that continuing operating deficits were sufficient evidence of such exigencies. Again, a board's judgment was upheld.

*Krotkoff v. Goucher College*⁴⁵ further established that boards of trustees have latitude to make retrenchment decisions. As part of a general retrenchment program, Professor Krotkoff, a tenured faculty member, was dismissed from her position. The court noted that the college had run deficits from 1968-69 through 1973-74 and enrollments had dropped from 1969-70 through 1976-77. Attempts by the trustees to stabilize the college included the adoption of a more aggressive investment policy, the rental of campus space to outside groups, the approval of salary freezes and reduction of administrative staff, the deferral of maintenance, and finally, the non-renewal of several nontenured faculty contracts. On appeal, the professor argued that the jury should have been allowed to assess the reasonableness of the trustees decision that the college faced financial exigency. Krotkoff's position was that since the college had an endowment and valuable land that it had not disposed of prior to her dismissal, Goucher College was not in a state of financial exigency.

In *Krotkoff* the Court of Appeals for the Fourth Circuit found that *Bloomfield* established that a trustee decision to sell or retain land was not a proper subject for judicial review and that *Bloomfield* also applied to the use of an endowment. The court ruled that whether the financial exigency existed should be determined by the adequacy of the college's operating funds rather than its capital assets.⁴⁶ According to the court the college was confronted by pressing financial need which required the board to secure the institution's future. The professor did not claim bad faith on the part of the institution, and indeed, evidence showed that the trustees reasonably believed that the college was faced with financial exigency and also had taken alternative cost cutting measures.

*Lumpert v. The University of Dubuque*⁴⁷ also left the determination of financial exigency to the board's discretion:

Whether a financial exigency existed is primarily a matter of subjective judgment, to be exercised by the officials charged with operating the University and not a question of fact to be determined by the jury. Moreover, we do not believe it is a matter for the substitution of the court's judgment . . . for that of an administrative body.⁴⁸

In *Levitt v. Board of Trustees of Nebraska State College*⁴⁹ and *Johnson v. Board of Regents*⁵⁰ the courts ruled that the public institutions' govern-

⁴⁵ *Krotkoff v. Goucher College*, 585 F.2d 675 (4th Cir. 1978).

⁴⁶ *Id.* at 681.

⁴⁷ *Lumpert v. The Univ. of Dubuque*, 255 N.W.2d 168 (Iowa Ct. App. No. 2-57568, April 14, 1977) (Table of Unpublished Opinions).

⁴⁸ *Id.*

⁴⁹ *Levitt v. Board of Trustees of Nebraska State College*, 376 F. Supp. 945 (D. Neb. 1974).

ing boards used proper judgment in their exigency declarations and also had authority to decide which teachers were to be dismissed following a declaration of exigency. The *Levitt* court stated: "[t]he defendants are granted wide discretion in the area of appointment, retention and discharge of faculty members, and this court may not overturn decisions in this area unless the decisions are patently arbitrary or baseless."⁵¹

An Illinois appellate court in *Rose v. Elmhurst College*⁵² recognized the decline of enrollment in a college as sufficient cause to declare a state of exigency and to release a tenured faculty member. The court, in upholding the termination, noted that the professor did not challenge the accuracy of the enrollment figures nor offer any proof that the action of the board was in bad faith.

An analysis of the case law of financial exigency reveals an emerging trend of judicial ratification of trustee exigency decisions. It is now clear that boards have the legal right to terminate tenured faculty to reduce the financial pressures of exigency. Such financial conditions must be bona fide, but courts have unanimously rejected the AAUP endorsed "survival standard." Terminations must be related to the exigency situation and the board must formally approve a declaration of exigency. Contractual policies must be followed.

Exigency case law also is beginning to define the fiduciary standards of college trustees. *Bloomfield* held that causation and the motivation of an exigency decision are proper subjects of court review. The business judgment standard utilized in the board's exigency decisions concerning the potential sale of capital assets was acknowledged and upheld. Furthermore, the court acknowledged that decisions concerning long term versus short term financial stability were properly the board's policy decisions. *Scheuer* confirmed that a board must have sufficient discretionary authority to make retrenchment decisions. *Krotkoff* added the additional notion that these types of protected decisions must be reasonable and made in good faith. *Levitt* and *Lumpert* confirmed that exigency decisions are primarily a matter for the subjective judgment of the board, absent arbitrariness, ill will, fraud, or collusion. Implicit in the afforded legal protection is the requirement of a trustee's fiduciary duty to monitor financial information, to demand additional information when necessary and to be continually informed at all times about the relationship between financial data, board policy, legal ramifications, and legal alternatives.

Courts appear to be fashioning a hybrid "business judgment rule" for boards of trustees' decisions on financial exigency which authorize

⁵⁰ *Johnson v. Board of Regents*, 377 F. Supp. 227 (W.D. Wisc. 1974). See also *Klein v. Board of Higher Educ. of the City of N.Y.*, 434 F. Supp. 1113 (S.D.N.Y. 1977).

⁵¹ *Levitt*, 376 F. Supp. at 952.

⁵² *Rose v. Elmhurst College*, 62 Ill. App. 3d 824, 379 N.E.2d 791 (1978). See also *Bignall v. North Idaho College*, 538 F.2d 243 (9th Cir. 1976); *Bellak v. Franconia College*, 118 N.H. 313, 386 A.2d 1266 (1978); *Jimenez v. Almodovar*, 650 F.2d 363 (1st Cir. 1981) for same result.

faculty terminations. Historically, such a rule has heretofore been fashioned first to provide a legal defense for corporate officers and directors in lawsuits by shareholders seeking to reverse decisions and second to assess personal liability for business decisions. This corporate rule holds, "the law will not hold directors liable for honest errors, for mistakes in judgment, when they act without corrupt motive and in good faith, that is, for mistakes which may properly be classified under the head of honest mistakes."⁵³

The purpose for such a rule has been summarized and debated many times.⁵⁴ The rule applies only to a decision that was actually made, not to cases where a failure to act is alleged. The protection of honest, although perhaps unsuccessful, business decisions is no doubt paramount. In addition, courts have sought to prevent potential challenges to every corporate decision so as not to unduly affect corporate decision making. Such a rule also finds substance in the courts' concern for avoiding a management role for judges in the corporate structure. For these reasons courts have ratified exigency decisions made in good faith by college trustees.

By providing a presumption of due care and good faith,⁵⁵ the "business judgment rule" prevents a court from examining in detail the merits of a business decision once that presumption has arisen.⁵⁶ A court's inquiry will consist of an examination of the director's reasonable effort to ascertain and consider all relevant information.⁵⁷ The director must show proof that he was motivated by an honest desire to benefit the corporation and not by other purposes such as self-gain. The burden of proof, unlike that demanded of college trustees in exigency cases, is on the plaintiff-shareholder. But if bad faith is proven by the plaintiff, the burden of proof then shifts to the corporate director to establish the reasonableness of the decision. A court will then examine the actions of a director to ascertain whether the director could have reasonably believed the deci-

⁵³ 3A FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS, 37-38 (1975); *Corporate Directors Guidebook*, 33 BUS. LAW. 1591, 1604 (1978). See *Briggs v. Spaulding*, 141 U.S. 132, (1891).

⁵⁴ See, e.g., Arsht, *The Business Judgment Rule Revisited*, 8 HOFSTRA L. REV. 93 (1979); Block and Prussin, *The Business Judgment Rule and Shareholder Derivative Actions: Viva Zapata?*, 37 BUS. LAW. 27 (1981); Brown and Phillips, *The Business Judgment Rule: Burks v. Lasker and Other Recent Developments*, 6 J. CORP. LAW 453 (1981); Duesenberg, *The Business Judgment Rule and Shareholder Derivative Suits: A View From the Inside*, 60 WASH. U.L.Q. 311 (1982); Johnson and Osborne, *The Role of The Business Judgment Rule in a Litigious Society*, 15 VAL. U. L. REV. 49 (1980); Veasey and Manning, *Codified Standard—Safe Harbor or Uncharted Reef? An Analysis of the Model Act Standard of Care Compared with Delaware Law*, 35 BUS. LAW. 919 (1980); and Note, *The Business Judgment Rule and the Litigation Committee: The End of a Clear Trend in Corporate Law*, 14 IND. L. REV. 617 (1981).

⁵⁵ *Sinclair Oil Co. v. Levien*, 280 A.2d 717, 720 (Del. 1971).

⁵⁶ *Auerbach v. Bennett*, 47 N.Y.2d 619, 629, 393 N.E.2d 994, 999-1000, 419 N.Y.S.2d 920, 926 (1979), cert. denied, 460 U.S. 1051 (1983).

⁵⁷ *Thomas v. Kempner*, 398 A.2d 320, 323-24 (Del. Ch. 1979).

sion was in the best interests of the corporation.⁵⁸ A finding of gross overreaching or abuse of a director's duty can still be determined even though good faith is presumed.⁵⁹ The "business judgment rule" has been properly characterized as a corollary to the corporate director's duties of care and loyalty.⁶⁰ The *Bloomfield* court's determination of good faith on the asset issue, and the *Krotkoff*, *Scheuer*, *Levitt*, and *Lumpert* courts' good faith tests are strikingly similar to the concepts of the corporate "business judgment rule."

A court will examine the board's right to protect financial stability against the right of any one tenured faculty member to continued employment. It appears that a court will rule for the trustees if the board is able to prove that a good faith decision resulted from financial considerations. Since exigency declarations are, as a practical matter, politically sensitive issues, they are generally avoided until absolutely no other alternative is left to the board. Documentation will be demanded by litigants, and the burden of proof will be on the board to show evidence of due care and good faith. Evidence such as a precarious cash position, declining enrollments, less drastic measures already taken, and projections of future financial instability are necessary to meet the burden of proof.

Significant duties of good faith and reasonable inquiry are presumed under both the corporate and nonprofit corporation court challenges. The holdings establish that college boards must deliberate carefully when considering exigency declarations and tenured faculty terminations and must be prepared to demonstrate informed decision making. And while ultimately the particular facts in any alleged breach of fiduciary duty will affect the outcome at trial, even a broadly stated, nebulous application of corporate director rules in lieu of stricter trust director rules should be recognized by college boards as indications of general judicial support and protection for exigency decisions.

B. Endowment Invasion and Asset Management

The second area of fiscal crisis decision making with legal ramifications arises when the board desires to use restricted funds for purposes other than those designated, in order to maintain the fiscal health of the institution. Three ownership doctrines have been formulated to deal with these issues.⁶¹ The first is a doctrine of absolute ownership whereby courts allow colleges directly to own donated funds and apply them to any

⁵⁸ In the case of a financial exigency question, the best interests could be defined as those actions which seek to maintain the financial viability of the college.

⁵⁹ See, e.g., *Gimbel v. Signal Companies*, 316 A.2d 599 (Del. Ch.), *aff'd*, 316 A.2d 619 (Del. 1974); *Muschel v. Western Union Corp.*, 310 A.2d 904 (Del. Ch. 1973); *Ludlam v. Riverhead Bond and Mortgage Corp.*, 244 A.D. 113, 278 N.Y.S. 487 (1935).

⁶⁰ *Brown and Phillips*, *supra* note 54, at 454.

⁶¹ *Berry and Buchwald*, *Enforcement of College Trustees Fiduciary Duties: Students and the Problem of Standing*, 9 U.S.F.L. REV. 1, 16 (1974).

legitimate purpose.⁶² Other courts have formulated a theory of trust which honors the donor's intent above all other considerations.⁶³ A third theory, the doctrine of donor's intent, treats the college as owner or trustee depending on the circumstances of each case.⁶⁴

It is clear from an examination of cases that unrestricted gifts in the form of trusts, endowments, legacies, and annual gift support will be enforced by courts as gifts for those corporate purposes contained in the college's charter or articles of incorporation. Those funds must be applied to the methods utilized in conducting ongoing activities.⁶⁵ Under trust law, any trustee action deemed beyond the powers of the charter can be held ineffectual by courts.⁶⁶ The degree of authority that the board is allowed to exercise is dependent upon the type of unrestricted money in question and which of the aforementioned ownership theories is utilized in the board's jurisdiction. The majority of these funds are in the form of previously donated gifts to the institution that the board continues to administer.

However, other gifts in the form of restricted annual donations, unrestricted or restricted endowments, and legacies⁶⁷ are subject to restrictions imposed by donors and accepted through board decisions and are

⁶² See, e.g., *St. Joseph's Hosp. v. Bennett*, 281 N.Y. 115, 22 N.E.2d 305 (1939); *Estate of Berry*, 29 Wisc. 2d 506, 139 N.W.2d 72 (1966).

⁶³ See, e.g., *Montclair Nat'l Bank and Trust Co. v. Seton Hall College of Medicine and Dentistry*, 96 N.J. Super. 423, 233 A.2d 195 (1967).

⁶⁴ See, e.g., *Grear v. Sifford*, 289 Ill. App. 450, 7 N.E.2d 371 (1937).

⁶⁵ The following cases considered gifts to institutions to be held in trust for corporate purposes: *Northwestern University v. Wesley Memorial Hosp.*, 290 Ill. 205, 125 N.E. 13 (1919); *Wellesley College v. Attorney Gen.*, 313 Mass. 722, 49 N.E.2d 220 (1943) citing *Harvard College v. Attorney Gen.*, 228 Mass. 396, 117 N.E. 303 (1917); *Amory v. Amherst College*, 229 Mass. 374, 118 N.E. 933 (1918); *Massachusetts Institute of Technology v. Attorney Gen.*, 235 Mass. 288, 126 N.E. 521 (1920); *Trustees of Andover Theological Seminary v. Visitors*, 253 Mass. 256, 148 N.E. 900 (1925); *Judkins v. Hyannis Public Library Ass'n*, 302 Mass. 425, 19 N.E.2d 727 (1939); *People ex rel. Scott v. George F. Harding Museum*, 58 Ill. App. 3d 408, 374 N.E.2d 756 (1978); *Thompson v. Dunham*, 239 A.2d 649 (Me. 1968); *Brown v. Memorial Nat'l Home Found.*, 162 Cal. App.2d 513, 329 P.2d 118 (1958), cert. denied, 358 U.S. 943, (1959); *Lynch v. Spilman*, 67 Cal. 2d 251, 431 P.2d 636, 62 Cal. Rptr. 12 (1968). The following cases, although not necessarily considering gifts to be technical trusts, nonetheless looked to the aforementioned guidelines: *Rowe v. Davis*, 138 N.J. Eq. 122, 37 A.2d 36 (1946); *Thomas v. General Bd. of Church of Nazarene*, 76 R.I. 197, 68 A.2d 66 (1949); *Stearns v. Newport Hosp.*, 27 R.I. 309, 62 A. 132 (1905); *Jones v. Habersham*, 107 U.S. 174 (1883); *Bradshaw v. American Advent Christian Home*, 145 Fla. 270, 199 So. 329 (1940); *Estate of Tomlinson*, 65 Ill. 2d 382, 359 N.E.2d 109 (1976); *Greil Memorial Hosp. v. First Alabama Bank*, 387 So.2d 778 (Ala. 1980); *in re Myra Found.*, 112 N.W.2d 552 (N.D. 1961); *First Wisconsin Trust Co. v. Board of Trustees of Racine College*, 225 Wis. 34, 272 N.W. 464 (1937); *Lehigh Univ. v. Hower*, 159 Pa. Super. 84, 46 A.2d 516 (1946); *Hobbs v. Board of Educ. of Northern Baptist Convention*, 128 Neb. 416, 253 N.W. 627 (1934); *In re Unruh's Estate*, 248 Pa. 185, 93 A. 1000 (1915).

⁶⁶ See, e.g., *Massachusetts Charitable Mechanic Ass'n v. Beede*, 320 Mass. 601, 70 N.E.2d 825 (1947).

⁶⁷ Two types of endowed gifts are possible, either through lifetime or testamentary

much more likely to be enforced by courts. The courts have established a framework for an analysis of the nature of fiduciary duties relating to fiscal expenditures, the corporate uses for which gifts can be made, and the role of courts in assessing the use of funds which deviate from the donors' original purposes.

Historically, courts of equity have provided the proper forum for approval of fund deviations. The United States Supreme Court has noted:

The condition that the trustees shall not alienate the land on which the schoolroom stands is also a condition subsequent, and is in accordance with the fifth section of their charter, and with the general law upon the subject. It will not prevent a court of chancery from permitting, in case of necessity arising from unforeseen change of circumstances, the sale of the land and the application of the proceeds to the purposes of the trust.⁶⁸

While acknowledging the power of courts to rule on fund transfers, courts are also sensitive to minimizing their involvement in this operational aspect of nonprofit corporations.⁶⁹ Yet some courts have not hesitated to apply trust principles to the use of restricted funds when fashioning their rulings.⁷⁰ Variations in court approaches make it difficult to predict when a court will apply corporate or trust principles.

1. Borrowing From Endowment

*In re Trusteeship Under Agreement with Mayo*⁷¹ exemplifies the concern that courts have in protecting the philanthropic interests of donors. The Supreme Court of Minnesota authorized a different investment strategy from the one outlined in a trust gift:

In our opinion the evidence here, together with economic and financial conditions which may properly be judicially noticed, compels us to hold that unless deviation is ordered the dominant intention of the donor to prevent a loss of the principal of the two trusts will be frustrated.⁷²

gifts. The first is a restricted gift as to purpose (such as a scholarship) with no limitation on the expenditure of the principal. The other variety is a restricted gift as to purpose with a requirement that the principal must be invested and that only the interest income be used for a specific purpose (such as a salary supplement for a professor). Gifts can be donated directly to the institution or established as off-campus trusts with income transferred to the institution on a specified basis.

⁶⁸ *Jones*, 107 U.S. at 183.

⁶⁹ It is not for the courts to substitute their judgment for that of the governing board on the question of what grounds are necessary for proper functioning of the charity. *Lycoming House v. Board of Revision of Taxes*, 164 Pa. Super. 538, 539, 67 A.2d 646, 647 (1949); *United Presbyterian Women's Ass'n of North America v. Butler County*, 110 Pa. Super. 116, 167 A. 389 (1933).

⁷⁰ See, e.g., *St. Joseph's Hosp.*, 281 N.Y. 115, 22 N.E.2d 305 (1939).

⁷¹ *In Re Trusteeship under Agreement with Mayo*, 259 Minn. 91, 105 N.W.2d 900 (1960).

⁷² *Id.* at 97, 105 N.W.2d at 904.

A court will often look to the dominant intention of the donor to enforce a gift and will seek to keep the donation viable. But a court may allow trustees to borrow from the principal of a restricted endowment gift under certain circumstances. In *Trustees of Alexander Linn Hospital Ass'n v. Richman*⁷³ a New Jersey court allowed a hospital to borrow from the principal of a charitable trust to complete a building:

Where, therefore, the very existence of the trust is in danger or its successful operation threatened, this court has the power to protect the public welfare by stepping in and modifying the settlor's [interest] to the extent necessary to preserve and continue the charitable trust.⁷⁴

If a court approves the borrowing against or use of restricted funds, the proceeds must either be used for the purposes stated in the trust provisions⁷⁵ or for the broader purposes found in the articles of incorporation. Under the latter purpose, a New York court upheld the sale of a laboratory by Cornell University,⁷⁶ subject to the restriction that the trustees apply the proceeds for the "advancement of science and education," one of Cornell's purposes under its charter. The issue was whether the gift of the laboratory was made subject to a restriction that it be used forever as a research lab. A court may have to decide whether the donor gave to the institution itself or to the charitable concept the institution represents (i.e. education). A court might declare that a gift of property, such as land, is useless for specific philanthropic purposes but that the sale proceeds must be applied to stated generic corporate purposes.⁷⁷

Courts have shown the propensity to defer to the judgment of trustees in asset management decisions as well as in termination-related exigency decisions. In *Morristown School Inc. v. Parsons*,⁷⁸ a court allowed a second mortgage on an endowment to complete a building project. It was the conviction of the trustees of the school that if the gymnasium was not completed, enrollment would decline and the school would in all probability close. The court accepted the judgment of the board and approved the mortgage. In *Foust v. William E. English Foundation*,⁷⁹ an Indiana appellate court, finding that a fiscal crisis was sufficient justification for the sale of a charity home, stated:

⁷³ *Trustees of Alexander Linn Hosp. v. Richman*, 46 N.J. Super. 594, 135 A.2d 221 (1957).

⁷⁴ *Id.* at 598, 135 A.2d at 223.

⁷⁵ *Bennett v. Attorney Gen. of N.C.*, 245 N.C. 312, 96 S.E.2d 46 (1957). The court allowed trustees to sell property instead of dissipating assets by fixing up and maintaining a retirement home.

⁷⁶ *Lefkowitz v. Cornell Univ.*, 35 A.D.2d 166, 316 N.Y.S.2d 264 (1970), *aff'd* 28 N.Y.2d 876, 271 N.E.2d 552, 322 N.Y.S.2d 717 (1971). See also *Knickerbocker Hosp. v. Goldstein*, 181 Misc. 540, 41 N.Y.S.2d 32 (1943).

⁷⁷ See e.g., *Heustess v. Huntingdon College*, 242 Ala. 272, 5 So.2d 777 (1942).

⁷⁸ *Morristown School Inc. v. Parsons*, 23 N.J. Super. 146, 92 A.2d 646 (1952).

⁷⁹ *Foust v. William E. England Found.*, 118 Ind. App. 484, 80 N.E.2d 303 (1948). *Contra*, *Englewood v. Allison Land Co.*, 45 N.J. Super. 538, 133 A.2d 680 (1957).

This latter [c]ompany has not been able to meet obligations under the lease. The buildings are antiquated and would require expenditures of large sums of money to keep them in their present condition; that the erection of a new building would necessitate a business venture requiring heavy loans and mortgages which might endanger the primary objective of the testator. . . .⁸⁰

Such a financial condition must be severe and not just a matter of financial inconvenience or burden for the board.⁸¹

2. *Cy Pres*

If a court rules that the use for which the trustees seek approval is different from that found in the transfer documents⁸² and the charter or articles of incorporation of the institution, then the court must apply the doctrine of *cy pres*. This doctrine is applied by courts of equity when a donor's gift is held by a charity which believes that the desire of the donor can no longer be carried out in the manner directed by the donor.⁸³ The majority of states recognize the doctrine either by statute or court decision.⁸⁴ Three conditions must be met in order for a court to apply the rule. First, the gift must be a charitable trust (since diluted by court decision). Second, there must be a general charitable intent expressed by the donor. Third, the court must be shown the impossibility,⁸⁵ impracticability,⁸⁶ or illegality⁸⁷ of carrying out the terms of the particular charitable purpose specified. The underlying philosophy of the doctrine is that the ultimate public good sought by gifts for charitable purposes must always be carried out and that the public is the ultimate beneficiary

⁸⁰ *Foust*, 118 Ind. App. 484, 503-504, 80 N.E.2d 303, 312.

⁸¹ See, e.g., *Harvard College v. Society for Promoting Theological Educ.*, 69 Mass. 280 (1855) where inconvenience and embarrassment were found to be insufficient grounds for court approval.

⁸² For example, a trust instrument, will, or letter.

⁸³ As near as (possible), the rule of *cy pres* is a rule for the construction of instruments in equity, by which the intention of the party is carried out as near as may be, when it would be impossible or illegal to give it literal effect. *Crane v. Morristown School Found.*, 120 N.J. Eq. 583, 586, 187 A. 632, 635 (1936). See also *RESTATEMENT (SECOND) OF TRUSTS* § 399 (1959). *Cy pres* is to be contrasted with deviation, another equitable doctrine used when the manner of conducting the purpose is in question, not the purpose itself. This distinction has been criticized. See *Smith v. Moore*, 343 F.2d 594 (4th Cir. 1965).

⁸⁴ For an examination of the doctrine, see *Chester, Cy Pres: A Promise Unfulfilled*, 54 IND. L.J. 407 (1979); E. FISCH, *THE CY PRES DOCTRINE IN THE UNITED STATES* (1950); Fisch, *Changing Concepts and Cy Pres*, 44 CORNELL L. REV. 382 (1959); and Note, *A Revaluation of Cy Pres*, 49 YALE L.J. 303 (1939).

⁸⁵ For example, a trust established by a will to fund scholarships for students attending a school which closed prior to the estate being settled. Also, the charitable need may have already been accomplished.

⁸⁶ For example, a trust designating one million dollars a year to aid newly diagnosed polio victims.

⁸⁷ For example, a trust that provides scholarships only to Caucasians.

of all charitable gifts. Under the doctrine of *cy pres*, no charitable intention should be frustrated, and a court will seek to apply the funds in question to another charitable activity of like purpose.

The significance of the *cy pres* doctrine is that since only a court can make a *cy pres* ruling, and thus an authorization for fund transfer, the board must determine whether its proposed use of a restricted fund will require court approval. This can be a difficult judgment for a board to make when a restricted fund does not contain language specifically authorizing alternative uses of principal or interest during periods of financial crises. If a board has any doubts as to whether such restricted funds may be utilized for other purposes, court approval should be sought. The board will no doubt be extremely sensitive to attendant publicity but a failure to seek approval may render the board liable for a breach of fiduciary duties for not protecting the assets in question.

In light of anticipated judicial reaction to asset diversion decisions, it is helpful to examine *St. Joseph's Hospital v. Bennett*⁸⁸ and *State University of New York v. Syracuse University*.⁸⁹ *St. Joseph's Hospital* sought a declaratory judgment to apply endowment funds earmarked for ordinary expenses of maintenance to payment of a mortgage debt and other activities within its corporate powers. The court noted that the words of the will setting up the endowment did not constitute a legal trust but did furnish a direction and restriction upon the use of the gift. The issue according to the court was not whether the gift was in the technical form of a trust but whether the clearly expressed direction of the donor must be obeyed. The motion for judgment was denied and the board was ordered to file a *cy pres* proceeding if it desired to alter the use of the funds.⁹⁰

State University of New York v. Syracuse University concerned a suit to enforce a contract provision which outlined the transfer of a medical college and which stated that certain endowments were also to be transferred. The Supreme Court of New York, in upholding judicial approval as a requirement for a *cy pres* determination, noted:

There is no doubt that Syracuse University is required to seek in good faith a judicial authorization of such a transfer of payments. . . . It (the medical college) could not, of course, by the contract with State University bind the donors of the funds or their executors; and it could certainly not bind the judicial discretion to be exercised on such an application.⁹¹

Thus, whether a decision involving asset dissipation involves trusts or other forms of restricted funds, whether the decision involves one institution or several, or whether the institution is expanding, retrenching

⁸⁸ *St. Joseph's Hosp.*, 281 N.Y. 115, 22 N.E.2d 305 (1939), 130 A.L.R. 1092 (1941).

⁸⁹ *State Univ. of N.Y. v. Syracuse Univ.*, 285 A.D. 59, 135 N.Y.S.2d 539 (1954).

⁹⁰ *Contra, Cleveland Museum of Art v. O'Neill*, 57 Ohio Op. 250, 129 N.E.2d 669 (C.P. 1955) where a court approved the diversion of trust funds to complete an additional building.

⁹¹ *State Univ. of N.Y.*, 285 A.D. 59, 61, 135 N.Y.S.2d 539, 541 (1954).

or closing, trustees are required to seek prior judicial or attorney general approval for expenditure of many restricted funds. One possible exception to this requirement is the potential right of the board to borrow from an unrestricted endowment fund that the board itself has established with unrestricted funds. A final answer on a particular fund rests with the language of the document, legal advice from the college attorney, and the judgment of the board.⁹²

C. Institutional Closure and Colliding Trusteeship Standards

As noted, the board of trustees may not have the power to spend the principal of many, if not all, restricted endowments and trusts without prior court approval. Whether approval is sought through a *cy pres* or declaratory judgment proceeding, the decision will not alter a court's responsibility to protect the intent of the donors who established such endowments or trusts.⁹³ If a college board has not sufficient funds to stabilize the financial condition of the college, the board may consider various forms of corporate change including merger, bankruptcy, and closure.⁹⁴ Legal problems and pitfalls arising from the first two options are relatively few. Case law is clear that a merger is not legally considered to be a change in purpose. In *cy pres* hearings following merger decisions, courts have attempted to fulfill the general charitable intent of donors. *Anna Jacques Hospital v. Attorney General*,⁹⁵ which upheld a merger plan of two hospitals, is typical:

⁹² Guidance can only be offered by a court of law and is summed up by the New York Supreme Court:

General rules, however, are not altogether helpful. In the last analysis, whether or not a director has discharged his duty, whether or not he has been negligent, depends upon the facts and circumstances of a particular case, the kind of corporation involved, its size and financial resources, the magnitude of the transaction, and the immediacy of the problem presented. A director is called upon "to bestow the care and skill" which the situation demands.

Litwin v. Allen, 25 N.Y.S.2d 667, 678 (Sup. 1940).

⁹³ Management of donor's gifts can be affected or altered by subsequent court decisions. As late as 1887 Congress annulled the charter of the Mormon Church for practicing polygamy and was upheld by the Supreme Court. The case also upheld the right of the judiciary to dispose of assets consistent with corporate purposes. *Late Corp. of the Church of Jesus Christ v. United States*, 136 U.S. 1, (1890).

⁹⁴ O'Neill and Barnett provide the following definition: In a consolidation merger, two or more corporations dissolve their respective legal identities and become a wholly new corporation carrying forth all the properties and obligations of the former corporation. A dissolution/acquisition merger involves an agreement under which one institution is legally dissolved and its assets and liabilities are acquired with court approval by the surviving institution. O'Neill & Barnett, *COLLEGES AND CORPORATE CHANGE: MERGER, BANKRUPTCY AND CLOSURE* 20 (1980). For a discussion of Chapter 11 bankruptcy as an alternative see Vecchione, *Chapter 11 of the Bankruptcy Code as an Alternative to Closing or Merger*, 8 J. COLL. & U.L. 2 (1981).

⁹⁵ *Anna Jacques Hosp. v. Attorney Gen.*, 341 Mass. 179, 167 N.E.2d 875 (1960). In this case assets were turned over to another hospital following a merger. In accord are *In re Trust of Bodine*, 429 Pa. 260 239 A.2d 315 (1968) where the Pennsylvania Supreme

The court can fairly infer an expectation on the part of the settlor that in the course of time circumstances might so change that the particular purpose could no longer be carried out, and that in such case the settlor would prefer a modification of his scheme rather than that the charitable trusts should fail. . . .⁹⁶

Several major legal concerns surrounding closure cases are often minimized in merger cases. One of the first concerns of any court in a merger decision is that the purposes for which the corporation and its trusts were created not be impaired by a proposed transfer of assets. When an entity continues to operate in a pre-determined location following a merger, this legal problem is usually minimized. Additionally, the merger is not usually seen as a change in purpose because location is seen as secondary to the educational purposes noted in the charter. Another major issue, the preservation of gift endowments, is satisfied by having the donor's wishes carried out by the surviving institution.⁹⁷ A *cy pres* hearing is required to ensure that all of these issues are formally dealt with in the court of appropriate jurisdiction.

The authority of a board to utilize bankruptcy as a means of reorganization has also been noted.⁹⁸ Again, the utilization of court proceedings in bankruptcy will protect the board from claims of decisions made outside the scope of board authority.

Prior to a closure decision, a board runs the risk of facing a petition for accounting of funds, for alleged breach of fiduciary duties, or even for an involuntary dissolution order. The former two actions were consolidated in *Jones v. Grant*,⁹⁹ where faculty, staff, and students alleged mismanagement of funds by a college president. As with many other previous legal challenges to trustee actions at other colleges, the case dissolved when the college declared bankruptcy.

Legal problems surrounding an accomplished closure decision are much more complex. At any point subsequent to a closure decision, the board risks two major confrontations: a legal challenge to its decision and a challenge to its authority to make that decision. On May 25, 1979, the

Court held that such a transfer did not even trigger a *cy pres* hearing; *Re Boasberg's Will*, 51 Misc. 2d 684, 273 N.Y.S.2d 717 (1966), *aff'd* 30 A.D.2d 638, 291 N.Y.S.2d 780 (1968); *Starr v. Morningside College*, 186 Iowa 790, 173 N.W.231 (1919); *Bell v. Carthage College*, 103 Ill. App.2d 290, 243 N.E.2d 23 (1968); *Central Univ. of Kentucky v. Walters' Executors*, 122 Ky. 65, 90 S.W. 1066 (1906); *Bryan v. Board of Educ.*, 90 Ky. 322, 13 S.W. 276 (1890), *aff'd* 151 U.S. 639, (1894); *Pennsylvania College Cases*, 13 Wall. (U.S.), 190 (1871); *Bridgeport-City Trust Company v. Bridgeport Hosp.*, 120 Conn. 27, 179 A. 92 (1935), 34 A.L.R. 3d 751.

⁹⁶ *Anno Jacques Hosp.* 341 Mass. 179, 181, 167 N.E.2d 875, 878 (1960).

⁹⁷ See, e.g., *Elliott v. Teachers College*, 177 Misc. 746, 31 N.Y.S.2d 796 (1941), *aff'd* 264 A.D. 839, 35 N.Y.S.2d 761 (1942), *aff'd* 290 N.Y. 747, 50 N.E.2d 97 (1943). Evidence was offered that the corporate purpose would not be affected by the merger.

⁹⁸ *O'Neill & Barnett*, *supra* note 94 at 33.

⁹⁹ *Jones v. Grant*, 344 So.2d 1210 (Ala. 1977).

higher education and legal communities learned of a court decision from the Orphans' Court Division, of Franklin County, Pennsylvania, whereby Judge John W. Keller enjoined the closing of Wilson College, scheduled for June 30, 1979, on that date or on any other date, without prior court approval.¹⁰⁰ In addition he removed the president of Wilson College and another college's president from the board, ordered that no college funds be expended on behalf of the trustees, and directed the trustees to pay court costs. Further, the judge held that continuation of the college as a teaching institution was neither impossible nor impractical, that the president had incompetently managed the college, (tuition was too low, faculty layoffs were insufficient, consulting reports were ignored, retrenchment plans similar to those utilized by other institutions were not attempted), and that the college was neither bankrupt nor in critical financial condition. Trustees of the 115 year old liberal arts womens' college in Chambersburg, Pennsylvania, declined to appeal the ruling, resigned, and were replaced by a new board approved by the judge.

Entrusted with an endowment with a book value of four million dollars, the trustees of Wilson College became enmeshed in a struggle unlike that of most other colleges and universities that have closed.¹⁰¹ Wilson's governing body had sought to preserve several million dollars in assets, which in their opinion would have been dissipated in the next several years, only to then arrive at the same closure decision. Today the college is still in operation, but several of the legal issues raised by the case remain unanswered.

Trustees should be concerned about an issue of asset preservation which has not yet been raised directly in any of the reported educational cases, including the Wilson College case, but which deserves consideration. At some point in a severe fiscal crisis, a board must deal with the issue of using unrestricted funds, restricted funds, and endowments to maintain a positive cash flow, to eliminate deficits, and to provide for ongoing operating funds. In such a situation, the board might even conclude that the college can remain open for a determined number of years if no other factors change, but that the institution will probably eventually be forced to close.

Two legal doctrines collide at this point—the fiduciary duty of care to manage assets wisely for corporate purposes and the trust doctrine of waste. The duty of care, whether a corporate or trust duty, requires board

¹⁰⁰ *Zehner v. Alexander*, 3 Franklin Co. L.J. 27 (Pa. Orphans' Ct. 1979).

¹⁰¹ One hundred sixty-seven independent colleges and branch campuses closed between 1970-1982. Forty-nine were two-year colleges, sixty-seven were four-year institutions and fifty-one were specialized schools (thirty-four of which were seminaries or religious schools). In addition, fifty institutions merged into other systems and twenty shifted to public control. Fadil & Carter, *OPENINGS CLOSINGS, MERGERS AND ACCREDITATION STATUS OF INDEPENDENT COLLEGES AND UNIVERSITIES-WINTER 1970 THROUGH SUMMER 1979* (1980); *THRIFT & HARRINGTON, OPENINGS, CLOSINGS, MERGERS AND ACCREDITATION STATUS OF INDEPENDENT COLLEGES AND UNIVERSITIES: 1980-1982* (1984).

members to exercise, at a minimum, the business judgment needed to use every dollar properly, to maximize investment income, and to promote the continuation of corporate purposes on a daily basis. The doctrine of waste obligates a trustee not only to employ profitably the assets of the institution but also to take care to preserve them.¹⁰² The standards under this doctrine mandate the duty of a trustee to invest trust funds so that they will be productive of income,¹⁰³ be used to the greatest advantage for the beneficiaries,¹⁰⁴ serve the purposes of the corporation,¹⁰⁵ and not jeopardize the corporation.¹⁰⁶

Under the doctrine of waste, a lawsuit is most likely to be brought against a board of trustees at a point following a declaration of financial exigency or a decision to close. Such a trustee challenge was no doubt a concern of the Wilson College board prior to its closure decision.¹⁰⁷ Under the corporate fiduciary standard, a board such as Wilson's could be charged with breach of the corporate duty of care for ignoring the current business realities and projections of the corporation's balance sheet and not closing earlier. Alternatively, under the trust standard, the board could be challenged for wasting the assets of the trust by not acting to close. During this entire decision making process, the board is pulled between conflicting fiduciary demands. In the long run, the board must preserve net corporate assets while in the short run assets must be expended to further the corporate purposes which the board has volunteered to carry out in perpetuity. In the case of gifts such as testamentary endowments, donors might challenge the use of such restricted funds for the payment of daily operating expenses. Such expenditures, it might be argued, would be a corporate waste of a donated principal given for a broader corporate purpose than the institution itself (higher education) and of money that should be used for the restricted purposes or used elsewhere.¹⁰⁸ Trustees might

¹⁰² SCOTT, THE LAW OF TRUSTS § 176, 227 (1967, 1982); RESTATEMENT (SECOND) OF TRUSTS § 176, 227 (1959); *Carlton's Estate v. Comm'r of Internal Revenue*, 298 F.2d 415 (2d Cir. 1962).

¹⁰³ *Blankenship v. Boyle*, 329 F. Supp. 1089 (D.D.C. 1971); *Harvard College v. Amory*, 26 Mass. (9 Pick.) 446 (1831).

¹⁰⁴ *John A. Creighton Home for Poor Working Girls' Trust v. Waltman*, 140 Neb. 3, 299 N.W.261 (1941).

¹⁰⁵ *Graham Bros. Co. v. Galloway Woman's College*, 190 Ark. 692, 81 S.W.2d 837 (1935).

¹⁰⁶ *Destitute of Bennington Co. v. Henry W. Putnam Memorial Hosp.*, 125 Vt. 289, 215 A.2d 134 (1965).

¹⁰⁷ See *supra* note 100 and accompanying text for a complete discussion of the Wilson College dilemma and subsequent lawsuits.

¹⁰⁸ "Although the terms of the donor's gift may require some other construction, a gift to a charitable corporation may be construed as an outright gift in perpetuity for its corporate purposes rather than a gift to it as trustee for others. In such a case the directors or trustees of the corporation are not technical trustees although they are fiduciaries and may have many of the same duties as trustees." *Bogert and Bogert, supra* note 24 at § 362 (1977). See also *YWCA v. Morgan*, 281 N.C. 485, 189 S.E.2d 169 (1972). Contrast this view with a recent ambivalent summary of the case law from a Delaware court:

also be challenged in their good faith attempt to preserve net assets by voting to close the college and to transfer assets to another college, foundation, or other entity with similar educational goals. In this case it is likely that a hybrid business judgment rule would be utilized and the board's decision ratified by the court. The key defense for a board should a suit arise, the business judgment rule, will require that the board have made a decision on the future of the college one way or another. Inaction by the board, in the face of the fiscal evidence requiring consideration of some action, negates the use of the rule. If the board is in possession of projections indicating that the institution would only remain open for a relatively short period of time, the board might be held liable under a breach of fiduciary duty theory for net asset losses incurred after receiving that data.

For example, *Hayman v. Brown*,¹⁰⁹ centered upon a suit by minority shareholders to compel the dissolution of a railroad. Plaintiffs urged that continued operation was in effect a waste of assets as there was no real prospect of a positive fiscal change in that segment of the company's business. The court, in upholding the board's decision not to sell, applied the business judgment rule:

The court may not interfere with the exercise of an honest business judgment of a Board of Directors; it will act only when confronted with fraudulent misconduct. In the absence of an affirmative showing of bad faith or fraud, it is not the province of a court to determine business policies of a corporation by substituting its judgment for that of directors charged with the responsibility of conducting the affairs of that corporation.¹¹⁰

A similar suit in the collegiate setting would most likely be brought either by a trustee who disagrees with the fiscal decisions being reached by the college's board or by a donor who objects to restricted funds being diverted to solve cash flow problems. The leading case demonstrating the board strategy of seeking court protection to avoid the possibly of a later suit is *Fenn College v. Nance*.¹¹¹ The board of Fenn College sought to transfer its facilities to a newly created state university and to transform itself into an educational foundation which would support educational endeavors. In upholding the transfer, the court acknowledged the authority of the board to make such a transfer in light of the board's analysis that

"In a loose sense, therefore, the assets of a charitable corporation are trust funds, but the extent and measure of that trust with respect to assets given outright to it are to be determined by the Certificate of Incorporation and By-Laws of the charitable corporation. Unless assets are given it upon express limitations and conditions, no charitable trust has been created in the technical sense." *Denckla v. Independence Found.*, 41 Del. 247, 250, 193 A.2d 538, 541 (1963).

¹⁰⁹ *Hayman v. Brown*, 176 Misc. 176, 177, 26 N.Y.S.2d 898 (1941).

¹¹⁰ *Id.* Note the striking similarity to language used in exigency layoff cases. *Supra* notes 29-52 and accompanying text.

¹¹¹ *Fenn College v. Nance*, 4 Ohio Misc. 183, 33 Ohio Op.2d 292, 210 N.E.2d 418 (1965).

an inadequate endowment, rising costs of maintenance, declining financial contributions and the establishment of a state university would put the current form of its corporate existence in peril.

Upon presentation of evidence of a threat to the accomplishment of state charter objectives, a court possessing equitable powers, in a local jurisdiction such as the *Fenn* court, has the basic power of the declaratory judgment or similar action to break trustee stalemates and to inject itself into a controversy.¹¹² The charter or the articles of incorporation is the nexus between the state and the corporation that properly places that power in the hands of the court.¹¹³ The granting of legitimacy to the nonprofit corporation through the issuance of a charter or articles permits the institution to operate and accept gifts from the public for the purposes noted in the charter. Courts thus properly retain the ultimate authority to supervise that special legal relationship. Therefore, a board of trustees may not close the college without court permission, a second unresolved issue arising out of the *Wilson College* case.

With the ultimate jurisdiction of the court also comes protection:

It is a natural and necessary branch of the jurisdiction over charitable trusts that the means or details prescribed for their administration should be subject to be molded so as to meet any exigency which may be disclosed by a change of circumstances, and to relieve the trust from a condition which imperils or endangers the charity itself or the funds provided for its endowment and maintenance.¹¹⁴

The court's jurisdictional power extends to liquidation of the corporation, application of *cy pres* proceedings to the remaining assets, and the fashioning of other judicial relief as appropriate. These powers are unquestioned and universally applied.¹¹⁵ Such a court action will also minimize liability exposure to the board for making a decision outside the scope of the charter or bylaws.

In addition to the courts' interest in the relationship between a charter (or articles) and state control, there is also a concern for the protection

¹¹² *Parsons v. Childs*, 345 Mo. 689, 136 S.W.2d 327 (1939), cert. denied, 310 U.S. 640 (1940); *Application of Botjer*, 9 A.D.2d 208, 192 N.Y.S.2d 650 (1959), aff'd 8 N.Y.2d 817, 168 N.E.2d 391, 202 N.Y.S.2d 323 (1960).

¹¹³ See also *In re Los Angeles Co. Pioneer Soc'y*, 40 Cal. 2d 852, 257 P.2d 1 (1953), cert. denied, 346 U.S. 888, (1953).

¹¹⁴ *Henshaw v. Flenniken*, 183 Tenn. 232, 245, 191 S.W.2d 541, 547 (1945). See also *City of Aurora ex rel. Egan YMCA*, 9 Ill. 2d 286, 137 N.E.2d 347 (1956).

¹¹⁵ See *Davenport v. Attorney Gen.*, 361 Mass. 372, 280 N.E.2d 193 (1972); *Town of Cody v. Buffalo Bill Memorial Ass'n*, 64 Wyo. 468, 196 P.2d 369 (1948); *Belcher v. Conway*, 179 Conn. 198, 425 A.2d 1254 (1979); *Gordon v. Mayor of Baltimore*, 258 Md. 682, 267 A.2d 98 (1970); *MacCurdy-Salisbury Educ. Fund v. Killian*, 30 Conn. Supp. 203, 309 A.2d 11 (1973); *Mackenzie v. Trustees of Presbytery of Jersey City*, 67 N.J. Eq. 652, 61 A. 1027 (1905); *First Christian Church v. Brownell*, 332 Mass. 143, 123 N.E.2d 603 (1955); *Snow v. President and Trustees of Bowdoin College*, 133 Me. 195, 175 A.268 (1934); 15 AM. JUR. 2d CHARITIES § 159 (1976).

of donors' funds. Such a concern goes beyond the *cy pres* rationale of carrying out donors' ultimate intent to the conferring of the right to accept gifts in the charter or articles. In *Hobbs v. Board of Education of North Baptist Convention*,¹¹⁶ a board sought instructions for an endowment fund from a local court of equity following a merger with another college. The court held that donors to the college intended to create a charitable trust through the endowment in order to protect the principal from trustee control. Judicial authority would be used to preserve those funds if possible and devote them to a general charitable purpose. The stipulations or understandings attached to such gifts were subsequent conditions to be followed by the board.¹¹⁷ Since the donors understood that gifts were to be used for stated corporate purposes, only a court could determine if closure was an allowable change of purpose under the charter.

In legal challenges seeking asset preservation a court is more likely to apply strict trust rather than corporate standards, whether or not those exact doctrines are identified as such. The trust doctrine of asset waste has been invoked by courts and dissolution ordered. For example, an Illinois Appellate Court, citing alleged illegal and oppressive acts by the foundation's president by the "actual and threatened waste and misapplication of the Foundation assets and the inability of the Foundation to carry out its purposes," dissolved a charitable foundation.¹¹⁸ The difficulty facing the trustee is that he or she is expected to perform the conflicting duties of asset preservation and maximization of income. The problem in a closure decision is that extraordinary efforts might produce additional revenue, but trustees take the risk of depleting assets should those efforts not stabilize the institutional finances. The Wilson College case demonstrates a potential pitfall of seeking to preserve net assets—legal claims that asset maximization standards of trust law are being breached. Case law indicates that asset preservation is more likely to be the ultimate concern of a court and that the board is not only mandated to seriously consider closure prior to bankruptcy but is also likely to have that decision upheld by a court of law. If the board seeks to close the institution prior to bankruptcy, it may receive permission to do so in a subsequent *cy pres* proceeding, providing the board can demonstrate impracticability of continued performance.

Two types of impracticability of performance are recognized by courts in a *cy pres* proceeding—insufficient assets and changing conditions that frustrate fundamental corporate purposes.¹¹⁹ Ironically, a board will prob-

¹¹⁶ *Hobbs v. Board of Educ. of N. Baptist Convention*, 126 Neb. 416, 253 N.W.627 (1934).

¹¹⁷ See also *Lehigh Univ. v. Hower*, 159 Pa. Super. 84, 46 A.2d 516 (1946).

¹¹⁸ *Eurich v. Korean Found. Inc.*, 31 Ill. App. 2d 474, 488, 176 N.E.2d 692, 699 (1961). See also *Harvard College*, 26 Mass. 446; *City of Boston v. Curley*, 276 Mass. 549, 177 N.E. 557 (1931); *Bellows Free Academy v. Sowles*, 76 Vt. 412, 57 A. 996 (1904).

¹¹⁹ Under either approval theory advanced, the board is more likely to achieve success in the twentieth century due to the recognized liberalization of the *cy pres* doctrine.

ably have to demonstrate that the fiscal situation of the college has deteriorated to a point approximating the AAUP "survival standard,"¹²⁰ the standard rejected for faculty layoff challenges. In meeting this standard it is not clear whether or not the board has a duty to radically alter its historical mission in an attempt to avoid such a severe financial crisis, nor are there always sufficient financial guidelines to assist the board in determining when continued operation of a college is no longer practical.¹²¹ Nonetheless board decisions have been upheld where trustees determined there were insufficient assets to compete with a neighboring nonprofit corporation;¹²² where the sale of a hospital, due to costs rapidly outpacing income, threatened the distribution of trust funds;¹²³ where the purpose contemplated was inexpedient and no longer financially feasible;¹²⁴ where deterioration of the physical plant threatened destruction of endowment funds;¹²⁵ where it was considered a wasteful expenditure of funds to build an underfunded project;¹²⁶ and where an entity was not required to exhaust all funds to maintain the trust.¹²⁷ Impracticability must be more than an inconvenience and the trustees may not by their own acts produce changed conditions which frustrate donor's intentions.¹²⁸

A board's claim of changing circumstances or conditions justifying closure can also be ratified by a *cy pres* determination. In *Trustees of Dartmouth College v. City of Quincy*¹²⁹ a court noted that a donor who founds or perpetuates a charitable institution must recognize that most institutions are likely to change over time, that they will become sterile if they remain static and that they must be adaptable to new public considera-

See E. FISCHE, *supra* note 84, at 139. Scott notes that the issue is how far the control of the founders should extend to prevent departure from their original direction. Scott, *The Fiduciary Principle*, 37 CALIF. L. REV. 539 (1949). See also RESTATEMENT (SECOND) OF TRUSTS § 381 (1959).

¹²⁰ *Supra* note 35.

¹²¹ See MILLER & ERWIN, A MODEL FOR THE SYSTEMATIC STUDY OF COLLEGE CLOSING, paper presented at the Finley Carpenter Research Conference, Ann Arbor, Michigan, May 7, 1982, at 9.

¹²² *Levings v. Danforth*, 512 S.W.2d 207 (Mo. Ct. App. 1974); *In re Neher's Will*, 279 N.Y. 370, 18 N.E.2d 625 (1939).

¹²³ *Trustees of Watts Hosp. v. Board of Comm'rs*, 231 N.C. 604, 58 S.E.2d 696 (1950).

¹²⁴ *Village of Hinsdale v. Chicago City Missionary Soc'y* 375 Ill. 220, 30 N.E.2d 657 (1940).

¹²⁵ *Pennebaker v. Pennebaker Home for Girls*, 297 Ky. 670, 181 S.W.2d 49 (1944); *Trevathan v. Ringgold-Noland Found. Inc.*, 241 Ark. 758, 410 S.W.2d 132 (1967).

¹²⁶ *Waterbury Trust Co. v. Porter*, 131 Conn. 206, 38 A.2d 598 (1944); *Teele v. Bishop of Derry*, 168 Mass. 341, 47 N.E. 422 (1897).

¹²⁷ *Mary Franklin Home for Aged Women v. Edson*, 193 Iowa 567, 187 N.W. 546 (1922).

¹²⁸ *Connecticut College v. United States*, 276 F.2d 491 (D.C. Cir. 1960). But a board may decline a gift or bequest and a *cy pres* hearing may result in the distribution of the assets elsewhere. See, e.g., *Olds v. Rollins College*, 173 F.2d 639 (D.C. Cir. 1949); *Noel v. Olds*, 138 F.2d 581 (D.C. Cir. 1943), cert. denied, 321 U.S. 773, (1944).

¹²⁹ 357 Mass. 521, 258 N.E.2d 745 (1970).

tions and unpredictable economic circumstances. The court added that if it appears that the unduly restrictive effect of the gift was in fact intended, "provisions no longer appropriate must be tested against the requirements of current public policy concerning the donor's fundamental charitable objective."¹³⁰ Competition from another corporation,¹³¹ decreasing demand for services,¹³² changing societal needs,¹³³ and an indefinite postponement of building plans¹³⁴ have all been recognized as sufficient changing conditions to invoke a *cy pres* ruling.¹³⁵

A board's trust duty of loyalty as exemplified by its concern for the overall education plan of the institution was also noted as an appropriate basis for a *cy pres* approval in *Attorney General v. President and Fellows of Harvard College*.¹³⁶ In a suit challenging Harvard's decision to physically relocate an arboretum, the court advanced the concept of a dominant public interest in attaining maximum usefulness of assets. The plan obligation of the trustees, noted the judge, was to bring the attention and judgment required of all trustees in the performance of their trust duties to the issue of the effect of the move on the continued accomplishment of the trust. Reliance on legal counsel, on presidential memos, and on other professionals in the discipline and acknowledgment of alternate viewpoints were evidence of the trustees' good faith. The move was upheld.

If a college has any permanent endowment funds, a court will probably apply trust laws to protect those funds. In *Crane v. Morristown School Foundation*¹³⁷ the court used the term "public trust" to apply funds of

¹³⁰ *Id.* at 534, 258 N.E.2d at 753.

¹³¹ *In re Heher's Will*, 279 N.Y. 370, 18 N.E.2d 625 (1939).

¹³² *In Re Board of Educ. of Utica City School Dist.*, 18 Misc. 2d 192, 184 N.Y.S.2d 735 (1959).

¹³³ *Dunbar v. Board of Trustees of George W. Clayton College*, 170 Colo. 327, 461 P.2d 28 (1969).

¹³⁴ *In re Dean*, 167 Misc. 238, 3 N.Y.S.2d 711 (1938).

¹³⁵ If a board submits a *cy pres* plan to the court which requests that the remaining assets to be applied to either a similar institution located elsewhere or to general educational purposes provided through an alternative corporate structure, the court's ruling must reflect *cy pres* principles which seek to fulfill the general charitable intent of donors and all parties concerned. Any plan of distribution by a dissolving corporation is not binding on a court. *In re Veterans' Industries, Inc.* 8 Cal. App. 3d 902, 88 Cal. Rptr. 303 (1970).

Under such a *cy pres* proceeding, the board has not only protected the net assets under its control, but has also realistically defused further lawsuits seeking to challenging the closure decision. The *cy pres* ruling of the court, unless appealed, precludes potential legal challenges, and assets will be distributed for other charitable purposes as near as possible to those described in the charter or articles of incorporation. See, e.g., *Marvel v. Sadtler*, 25 Del. Ch. 288, 18 A.2d 231 (1941); *McDonough County Orphanage v. Burnhart*, 5 Ill.2d 230, 125 N.E.2d 625 (1955); *Application of Italian Benevolent Institute*, 157 N.Y.S.2d 485 (1956), modified, 5 A.D.2d 816, 170 N.Y.S.2d 992 (1958).

¹³⁶ *Attorney Gen. v. President and Fellows of Harvard College*, 350 Mass. 125, 213 N.E.2d 840 (1966).

¹³⁷ *Crane v. Morristown School Found.*, 120 N.J. Eq. 583, 187 A. 632 (1936).

a closed institution to aid another school with similar purposes. Clearly the court was trying to protect donated assets from creditors.¹³⁸

Insufficient endowments for one charitable purpose have been afforded judicial protection through authorized transfers to other entities in several cases, including *Schell v. Leander Clark College*.¹³⁹ That case noted the number of competing institutions in the region, the low attendance, the continual borrowing of funds, the neglect of property, the obsolete library and the deteriorating laboratories as factors in the decision of the trustees to merge with another college. In the words of the court, the college "simply ceased to exist, because it could not continue to carry on its work with the funds available. . . ."¹⁴⁰

In evaluating claims that the impracticability element of the *cy pres* doctrine should be required, a court may also examine a college's potential for future external funding. Such evidence was used in *Harris v. Attorney General*,¹⁴¹ the court noting not only the continuing deficits of a museum but also the lack of funding to repair the property in question. This court defined practicability as "capable of being used or dealt with successfully,"¹⁴² a phrase that provides minimal guidance to other boards.

*Teachers College v. Goldstein*¹⁴³ exemplifies court opinions which utilize funding documents to determine the college's charitable purpose in a *cy pres* case. In that case, a board attempted to discontinue operation of a formerly merged school, to sell the premises, and to utilize income to fund other experimental work in the same field. The board asserted that the purpose of the grants was to further experimentation in the field of education and that the school in question was only a current method of doing so. The court held that the board's action was reasonably calculated to further and ensure the performance of that type of experimentation, that the school was doing little to advance research across the country, and that an intelligent and unprejudicial consideration was given by

¹³⁸ See *State v. Van Buren School Dist.*, 191 Ark. 1096, 89 S.W.2d 605 (1936) where a court used similar language to protect assets from seizure by the State of Arkansas.

¹³⁹ *Schell v. Leander Clark College*, 10 F.2d 542 (W.D. Iowa 1926). See also *Plechner v. Widener College*, 569 F.2d 1250 (3d Cir. 1977) where the discretion of trustees was upheld in a stock issuance as part of a merger. *Lupton v. Leander Clark College*, 194 Iowa 1008, 187 N.W. 496 (1922); *Harwood v. Dick*, 286 Ky. 423, 150 S.W.2d 704 (1941) where the court noted that the trustees tended to perpetuate and perhaps save [the college] from failure, not terminate and destroy as the plaintiffs claimed; *Davison v. Duke Univ.*, 282 N.C. 676, 194 S.E.2d 761 (1973) where the court recognized modification of an endowment to protect an unforeseen exigency.

¹⁴⁰ *Schell*, *supra* note 139, at 555.

¹⁴¹ *Harris v. Attorney Gen.*, 31 Conn. Supp. 93, 324 A.2d 279 (1974). See also *Conway v. Emeny*, 139 Conn. 612, 96 A.2d 221 (1953) for the initial case in an ongoing twenty-one year situation facing a board of trustees who desired to keep a museum funded by a trust open to the public.

¹⁴² *Harris*, 31 Conn. Supp. at 99, 324 A.2d at 283.

¹⁴³ *Teachers College v. Goldstein*, 70 N.Y.S.2d 778 (1947), *modified*, 273 A.D. 11, 75 N.Y.S.2d 250 (1947).

the board to the proposal. A board could use the same rationale under a college's charter by claiming that the location or existence of the institution was secondary to the current method of fulfilling broad charter objectives of education and that a foundation created with net assets would legitimately fulfill those same purposes.

In few cases other than the Wilson College case has a court prevented a closure or merger decision from being implemented.¹⁴⁴ Those cases have either based their decision on charter prohibitions¹⁴⁵ or on claims of fraud and deceit.¹⁴⁶

A synthesis of the case law indicates that a court is likely to examine at least four issues in its analysis of a closure decision. The first issue is whether the board breached its fiduciary duties in arriving at a decision or in failing to arrive at a decision. There is no obvious relationship in the cases between the use of corporate law or trust law principles and the court's reasoning of a case or its eventual results. Generally, all the courts have examined the facts surrounding the cases, the process utilized to make the decision, the information before the board, and the good faith or lack of fraud, ill will, or deceit apparent in the decisions. Courts have, in effect, utilized a form of the business judgment rule in analyzing the decision, without labeling it as such. The court will not generally presume good faith on the part of the board, and the challenging party must carry the burden of proving bad faith, ill will, fraud or deceit.¹⁴⁷ It remains to be seen whether the business judgment analogies found in exigency cases will be extended to college closure cases in the future.

¹⁴⁴ *Fenn College*, 4 Ohio Misc. 183, 33 Ohio Op.2d 292, 210 N.E.2d 418; *Trustees of Rush Medical College v. Univ. of Chicago*, 312 Ill. 109, 143 N.E. 434 (1924); *Ranken-Jordan Home v. Drury College*, 449 S.W.2d 161 (Mo. 1970). See also *Oleksy v. Sisters of Mercy of Lansing, Michigan*, 92 Mich. App. 770, 285 N.W.2d 455 (1979) for same result; *Paterson v. Paterson General Hosp.*, 97 N.J. Super. 514, 235 A.2d 487 (1967); *Taylor v. Baldwin*, 362 Mo. 1224, 247 S.W.2d 741 (1952). See also *Holden Hosp. Corp. v. Southern Illinois Hosp. Corp.*, 22 Ill.2d 150, 174 N.E.2d 793 (1961) where a sale of assets to another corporation was upheld. The contract required the buyer to operate a hospital. In effect this was held to be a donation and the court ruled that the ultimate purpose, health care, was being served. See also *Scott-Lees Collegiate Inst. v. Charles*, 283 Ky. 234, 140 S.W.2d 1060 (1940); *Attorney Gen. v. President and Fellows of Harvard College*, 350 Mass. 125, 213 N.E.2d 840 (1966); *Crane v. Morristown School Found.*, 120 N.J. Eq. 583, 187 A. 632 (1936); *State v. Van Buren School Dist.*, 191 Ark. 1096, 89 S.W.2d 605 (1936) where a court used similar language to protect assets from seizure by the State of Arkansas.

¹⁴⁵ See, e.g., *New York Medical College, Etc., v. Dieffenbach*, 125 Misc. 698, 211 N.Y.S. 799 (1925) where the charter imposed both a public duty to provide a medical education facility, which the trustees sought to sell, and a hospital which they sought to keep; *Hempstead v. Meadville Theological School*, 284 Pa. 147, 130 A. 421 (1925) where trustees had not sought court approval.

¹⁴⁶ *Paine v. Saulsbury*, 200 Mich. 58, 166 N.W. 1036 (1918).

¹⁴⁷ See, e.g., *In re Patterson's Estate*, 3 A.2d 320 (1939) where the burden of plaintiff challenging a college's failure to teach denominationalism was stated: "[T]he burden of proving such non-compliance by clear evidence is on the moving party. There must be a persistent and consistent failure, and one that shows an utter, wilful disregard of the purposes." *Id.* at 321.

The second issue the court will likely examine is whether the board followed the correct procedures for closure mandated by state law, its charter and its bylaws. The likelihood of a challenge is minimized if the board initiates court approval rather than responding to a lawsuit.

Third, the court might examine the effect of closure on faculty and student contract rights. Contractual issues are a growing area of the law of student rights,¹⁴⁸ and a cause of action based on this theory should be of concern to the board. A student might base a cause of action on the theory that closure, particularly in mid-year, breaches a contract with the institution that requires the college in exchange, for tuition payments, to provide the student the opportunity to complete requirements for course credits or a degree.

Fourth, the court might examine the adverse impact on the public interest resulting from an institution's closure. More and more, access to education is at the forefront of public policy decisions in education.¹⁴⁹ A preliminary injunction might be issued to block a closure decision pending a full hearing on the issues.¹⁵⁰

D. Standing Issues and Reversionary Interests

The legal requirement of standing,¹⁵¹ which historically has precluded many lawsuits concerning trustee decisions, is becoming more liberalized through judicial decisions.¹⁵² Faculty, dissident trustees, students, alumni, and donors are potential plaintiffs in lawsuits challenging asset use and decisions to close or not to close institutions. The state attorney general will generally have the right to intervene on behalf of the public¹⁵³ or

¹⁴⁸ See, e.g., Jennings, *Breach of Contract Suits by Students Against Postsecondary Education Institutions: Can They Succeed?* 7 J. COLL. & U.L. 191 (1980-81); Olswang, Cole and Wilson, *Program Elimination, Financial Emergency and Student Rights*, 9 J. COLL. & U.L. 163 (1982-83). Students could sue for specific performance of the contract. See, e.g., *Sternberg v. Board of Trustees of Kent State Univ.*, 37 Ohio St.2d 115, 308 N.E.2d 457 (1974).

¹⁴⁹ See, e.g., *In re Antioch Univ.*, 418 A.2d 105. There would certainly be a stronger case if the institution was publicly supported. *Dartmouth* seems to say that the private notion of an independent institution makes this claim less plausible for a challenge to an independent college closure. *Supra* note 3.

¹⁵⁰ The power of the plaintiff to return to court to seek modification or continuation of an injunction makes this potential suit a realistic concern for the board. The court could continually be involved in ongoing exigency decisions.

¹⁵¹ Standing is a requirement that the plaintiffs have been injured or been threatened with injury . . . and focuses on whether the litigant is the proper party to fight the lawsuit, not whether the issue itself is justiciable. *Carolina Environmental Study Group, Inc., v. United States Atomic Energy Comm.*, 431 F. Supp. 203, 218-19 (W.D. N.C. 1977).

¹⁵² See, e.g., *Holt v. College of Osteopathic Physicians and Surgeons*, 61 Cal.2d 750, 394 P.2d 932, 40 Cal. Rptr. 244 (1964); *Jones v. Grant*, 344 So.2d 1210 (Ala. 1977); *Coffee v. William Marsh Rice Univ.*, 387 S.W.2d 132 (Tex. Civ. App. 1965), rev'd, 403 S.W.2d 340 (Tex. 1966); *Miller v. Alderhold*, 228 Ga. 65, 184 S.E.2d 172 (1971).

¹⁵³ See, e.g., Note, *Sour Note on Sweet Charity: Is Attorney General's Control Effective?* 9 LINCOLN L. REV. 257 (1975); Berry and Buchwald, *Enforcement of College Trustees'*

to seek dismissal of a suit should one be filed.¹⁵⁴ In addition, some church related institutions have maintained sufficiently close legal relationships to denominational bodies through charters, deeds, and other legal documents to have standing accorded them, given potential reversionary interests in college property.¹⁵⁵

CONCLUSION

Any legal analysis of independent college fiscal crises must consider the nature of the nonprofit corporation, the trustee as a fiduciary, and the nature of financial stringency.¹⁵⁶ These concepts define, and thus limit, the courses of action independent college trustees may take.

Court rulings and legislation have established the principle that college board members are fiduciaries with the corresponding duties of care and of loyalty. Courts differ as to whether corporate or trust standards should be applied; however, the majority apply corporate standards to analyze college trustee exigency decisions. Moreover, trust or quasi-trust standards may also be applied to complex issues of asset preservation.

A variation of the corporate fiduciary standard of care—the business judgment rule corollary—appears to be developing as a standard for analyzing layoff situations. In effect the courts are saying that such decisions are policy matters to be decided by boards, not by the legal system. However, evidence of bad faith by the board may be introduced to overcome that presumption.

If the board desires to use restricted gifts or endowments for purposes other than the specific purposes for which they were given, the board must usually petition an appropriate court or state agency for a *cy pres* ruling.

A review of the case law demonstrates that a board does not have the same legal freedom to close the institution as it has to merge with another institution. Courts are likely to view a college closure as an action that can be authorized only by the judiciary or the appropriate state agency.

When the board's closure decision is approved by the court, the fear of potential lawsuits over the decision itself is eliminated. An examination of fiduciary standards for boards of trustees shows that a board has an affirmative duty to seriously consider closure of a financially troubled institution prior to a formal condition of bankruptcy. Under either the

Fiduciary Duties: Students and the Problem of Standing, 9 U.S.F.L. REV. 1 (1974); Comment, *Divestiture Resolutions: University Director Liability Under the Emerging Corporate Standard*, 15 U.S.F.L. REV. 261 (1980-81).

¹⁵⁴ See, e.g., *Kolin v. Leitch*, 343 Ill. App. 622, 99 N.E.2d 685 (1951).

¹⁵⁵ See Moots & Gaffney, *CHURCH AND CAMPUS: LEGAL ISSUES IN RELIGIOUSLY AFFILIATED HIGHER EDUCATION* (1979).

¹⁵⁶ For a comprehensive discussion of the issues and case law contained in the conclusions, see JOHNSON, *FIDUCIARY DUTIES AND FINANCIAL EXIGENCY: THE INDEPENDENT COLLEGE TRUSTEE AND COLLEGE CLOSINGS* (1984).

corporate or trust fiduciary standard, the trustee has an obligation to maximize the assets of the institution. In addition, under the trust standard, the trustee has an obligation to prevent the destruction or waste of corporate assets. Such a trust obligation could be invoked by a court upon petition by a third party claiming that the closure of the institution is inevitable and net asset preservation is of paramount concern. Thus there are three separate breaches of fiduciary duties that must concern trustees and their legal counsel: breach of the duty of care for failure to seek approval by the court for a closure decision; breach of a duty of care for allowing assets of the corporation to deteriorate into a condition of bankruptcy; and a breach of the duties of care and loyalty for making bad faith or fraudulent decisions in dealing with the wide range of possible fiscal crises.

The realities of meeting fiduciary standards which are seemingly conflicting and unclear present a multitude of problems to boards in a litigious environment.¹⁵⁷ Unclear standards result in slower and equivocating decisions, or no decisions at all. Making and justifying exigency-related decisions is difficult because there are no clear economic guidelines for evaluating and justifying exigency-related decisions. The precedential results of lawsuits involving other colleges might further hinder a board's ability to make decisions which it feels are quite properly its own. Meanwhile, there are more and more colleges facing serious financial problems requiring difficult legal and business guidance. Above all, it is vital that boards recognize that legal standards, no matter how nebulous, require that fiduciaries take their responsibilities and mandates seriously and make the tough decisions they were selected to make.

¹⁵⁷ Those legal realities now apparently extend to the hiring of a college president by an institution with financial problems. On December 21, 1984, Yankton College, Yankton, South Dakota, filed a Chapter 11 petition in bankruptcy. On January 22, 1985, the former president of the college filed a lawsuit against the college trustees alleging that the trustees were negligent in not ascertaining the true financial condition of the college before extending the contract offer to the incoming president. *Couch v. August* (C.C.S.D. filed Jan. 22, 1985). See *Yankton President Charges Negligence by Trustees*, CHRON. HIGHER EDUCATION, February 6, 1985 at 2.

Closing A College: Trustee Decisions And Administrative Policies

6.

"So the night passed, but then no morning broke"

John Masefield, Dauber

Closing a college is a painful, difficult, and certainly the most final of all types of corporate change. While this chapter deals largely with a planned closing, it should be noted at the outset that some colleges have been forced to close, sometimes in mid-year, without the grace of a planning period. Trustees should be aware of the damage which a precipitous, unplanned closing inflicts on the careers and personal lives of students and staff. Nor should they forget the potential liability to themselves where negligence may be involved in starting an academic year without a reasonable expectation of completing it.

A. Setting The Goals For Closing

In a review of case studies and in interviews with trustees and senior administrative staff, it is occasionally evident that trustee priorities in a closing differ considerably from those of the administration. Trustees tend to be more involved in financial and real estate decisions than in academic ones. They may have little contact with students. If a faculty union is involved, relationships with the faculty may have been more adversarial than friendly. It would not be unusual then to find a bias on the part of trustees to give greater priority to activities which maintain the value of the "estate" than to those which ease the job anxieties of faculty or the transfer problems of students.

Administrators who are in daily contact with students and faculty tend to be more sensitive to the human problems of a closing and value their solution more highly. Working with two different sets of priorities in a situation already charged with emotion is a sure source of conflict. Goals and outcomes should be clearly stated by the board of trustees and embodied in a budget especially

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prepared for the closing period. The statement of goals should explicitly include the following:

1. To limit as far as possible the damage which the closing may inflict on the academic progress of students and on the careers of faculty and staff
2. To fulfill as far as possible financial obligations to students, employees, lenders, and vendors
3. To maintain as much as possible the corpus of the endowment and remaining assets and to preserve them for charitable or educational purposes.

B. Timing Of The Announcement To Close

The consensus of opinion of those interviewed in case studies was that the announcement date for the closing should be no later than midway through the first term of the college's final academic year, that is, sometime between Thanksgiving and Christmas. There were some fears that a November-December announcement could result in a high drop-out rate for the final semester. This did not prove to be the case at Annhurst College (CT) or at Immaculate Heart College (CA). In fact, in these cases, the announcement that the college was closing gave drop-outs from previous years an incentive to complete their degree requirements while there was still time and opportunity to do so.

There are four factors which support the choice of a mid-term announcement:

1. A mid-term announcement allows for a schedule of courses during the subsequent winter, spring, and summer academic terms to allow as many students who can finish their programs of study to take advantage of the opportunity.
2. Students have a greater range of possibilities for transferring to another college.
3. Faculty and staff have time to begin job searches and can be assisted in that process.
4. Arrangements can be made with federal and state officials to assure appropriate protection of all concerned. (At Immaculate

Heart College, for example, the federal regional office allowed summer school students to draw financial aid reserved for the following fall term.)

An orderly closing requires both careful planning and sufficient lead time to implement the plan for closing. If, as in the case of Ladycliff College (NY), the closing is announced in the last month of the Spring term, students may be unable to find a college nearby which offers the courses they need to graduate. Academic and financial aid transcripts may be difficult to complete. The college may find itself sued by the faculty because the announcement of closing occurred after the contract cancellation date stipulated in their employment contracts.

C. Before The Announcement

Status of the Board of Trustees

The board of trustees is charged with overseeing the affairs of the legal corporation. As the embodiment of the corporation, the board continues to have responsibilities and can incur liabilities beyond the time of its decision to close. To insure the continuity of the board's responsibility and the legality of its actions, counsel should determine:

1. Are student or faculty trustees eligible to vote after the institution closes? At Windham College the Board's by-laws did not take such circumstances into account and the legality of at least one board meeting was challenged.
2. Are trustees willing to serve during the period of closing, dissolution, and liquidation? Closing down the corporation, selling its assets, and then transferring those assets to a successor corporation may take several years to accomplish.

Avoiding Conflicts of Interest

There may be a good deal of money at stake in the sale of college property and in the disposition of equipment and assets. It is not unknown in college closings for board members or staff to attempt to turn the college's distress to their own personal financial advantage.

The board of a tax-exempt institution should be especially careful to establish *written* procedures for the sale of assets, the acceptance of bids for real estate fees and appraisals, and the disposition of equipment and the library collection.

To avoid conflicts of interest, board members who represent possible successor organizations or creditors may wish to absent themselves from committees which make recommendations about the disposition of assets.

Charter and Legal Obligations¹

The board should retain counsel to determine:

1. Whether permission of the court and/or the state's Attorney General is required before the trustees can implement their decision; and
2. Whether the proposed disposition of assets after liquidation conforms to state law and regulation and can be permitted by law.

In addition, a determination should be made whether the department of state government responsible for higher education plays any supervisory role in the college's closing and dissolution.

Once these issues have been determined, there are at least seven other matters to address.

1. The Board of Trustees should adopt a resolution to cease operations. The resolution should contain at least three items:
 - Reasons for closing
 - A date for the cessation of all academic activities
 - A statement regarding acceleration or curtailment of any academic activities which might affect contractual obligations to students.
2. If state or court authority or permission is necessary to implement the decision to close, appropriate requests and petitions should be drawn up prior to the announcement for immediate transmittal after the announcement. Competent counsel is necessary to insure that this step is executed properly.

¹A thorough discussion of the legal requirements for dissolution is provided in Chapter 5. State laws and regulations on dissolution are summarized in Appendix 2.

3. All public statements should be drafted and approved by the appropriate members of the board, the president, and counsel.
4. Meetings with the following constituent groups should be scheduled to explain the decision and subsequent procedures:
 - Faculty
 - Professional staff and administrators
 - Union leaders
 - Students (or student leaders)
 - Creditors
 - Town leaders and officials
 - Alumni
 - Key contributors, especially those with an interest in restricted endowments or large charitable remainder trusts
 - State officials
 - Regional federal financial aid officials.
5. Decisions regarding the timing of staff termination and the development of a transition team should be made prior to the announcement.
6. A timetable of decision-making and wind-down operations should be developed.
7. A budget for closing should be developed.

The budget for closing may be prepared in two stages: (a) From the announcement of the closing to the end of the academic year and (b) a Year II budget.² Uncertainty surrounding the final disposition of the property may prevent a Year II budget from being prepared until late in the process.

Closing costs which should be projected through the final closing of the institution are:

- a. Legal fees associated with review of the charter and petition to the courts to free restricted funds or dispose of assets, and legal fees associated with ongoing counsel during the closing process

²This statement presumes that the college will cease operations at the end of the academic year in progress (or at the end of a special summer term) and that at least one additional year is needed to complete the disposition of assets and other details of closing.

- b. Legal fees associated with the sale of real estate
- c. Appraisal fees for land, buildings, library, and equipment
- d. Real estate sale fees and closing costs
- e. Microfilming of student records and funds for the continued maintenance of records
- f. Unemployment compensation assessments (which will grow rapidly as the college winds down)
- g. Severance pay, if any
- h. Security and maintenance of buildings and property between the time of the college's closing and final sale
- i. Health and group life insurance coverage for at least two months after final closing
- j. Disposal of hazardous wastes from the chemistry and physics labs and other areas.

The Chief Executive

Has the president of the college so lost the confidence of the staff and the student body that his or her presence on the campus would hinder rather than advance the process of closing? This is a key question which the board should decide before announcing the closing of the college. The staff's personal loyalty to the chief executive is of utmost importance in a college closing. The usual incentives of salary increases and promotion have clearly evaporated. Only loyalty and professional pride are left to motivate the staff to do a difficult and unrewarding job. If it is inappropriate for the sitting chief executive to preside over the college's closing, an acting president who can command such loyalty should be appointed immediately.

Once a decision is made regarding the staff responsibilities for closing the institution, it should be communicated clearly to all college constituencies. If possible, it is well to make announcements such as these as part of the announcement of closing.

The person who presides over the closing of a college should be willing to serve at least part-time in that capacity until the entire process of dissolution is completed. Depending on the complexity of the situation, a part-time commitment may be sufficient following cessation of academic activities.

Staff Contracts

All faculty and staff members whose contracts will be terminated at the end of the academic year should be notified as soon as possible. Legal counsel should be consulted to determine whether those who will be retained beyond the closing date should be terminated and rehired under renegotiated and separate contracts.

The board should decide, aside from legal obligations, how the college can ease the transition of new employment for faculty and staff with long years of service to the college. The procedure for outplacement and severance is discussed in Chapter 7.

The Issue of Secrecy

In case studies and in personal interviews the question was raised whether the trustees' deliberations about the closing should be open to the public or be held in secret. In most college closings there was usually a general awareness that the institution was experiencing some financial difficulty; yet, when the announcement of the decision to close was made, it invariably came as a shock to all but those most directly involved in the decision. In the Newton College-Boston College merger, for example, fear of community reaction caused both parties to conduct negotiations in secret. The merger then was announced as a *fait accompli* and consummated before the community could organize against it. As James Whalen, the president of Newton College later wrote:

The behavior of the Newton and Chestnut Hill communities had been demonstrated to us twice before, and we were not prepared to let our last chance for a creative and dignified solution to Newton's problems be engulfed by a wave of community protest. Announcing our plans to the community before they were fully agreed on seemed a certain path to failure.³

Not all decisions to close face opposition, however, and not all situations are the same. At Franconia College the president felt that the decision to close was one that affected the entire community and that the decision itself should be arrived at openly even if many did not agree with it. The Goddard College

³Walter Borton, *The Newton College Consolidation* (unpublished manuscript), p. 136.

trustees also conducted their deliberations about keeping the college open with the college community present.

These instances point out that the issue of secrecy is one which the board must confront early in the decision-making process. Local circumstances and tradition, academic practice, administrative style, good public relations, and sheer good sense all play a part in the decision.

Reasons for Secrecy

- (1) Experience shows that when the business community becomes aware that a college is debating whether or not to close, credit tends to dry up, vendors demand cash on delivery, and protective liens may be filed prematurely for unpaid bills.
- (2) Premature public speculation about closing may make it more difficult to seek protection of assets under court supervised procedures.
- (3) Premature public speculation about closing may dry up sources of support. Students and donors become cautious about investing time or money in an institution which publicly debates its continued existence.
- (4) Faculty, students, or alumni may attempt to block the decision-making process thus effectively keeping the board of trustees from exercising their best collective judgment.

Reasons Against Secrecy

- (1) Faculty, staff, and students have the most to lose in a closing. It is not trustee careers and livelihoods which are at stake. A secret decision taken without the input of those most affected is basically an unfair one.
- (2) A decision openly arrived at may generate greater support and cooperation by college constituencies and reduce the human trauma associated with college closings.
- (3) A decision openly arrived at may be required by the college's traditions and past practice.
- (4) The decision itself is an educational experience in which members of the community have a right to participate.
- (5) The process of open decision-making may produce sources of support previously unavailable to the institution.

D. Making The Announcement

The announcement and press release announcing that the college is closing should be simple, clear, and brief. They should contain:

1. The reasons for closing
2. A date for cessation of all academic activities
3. A statement of which groups or constituencies will be contacted with further information.

Notices to Accompany the Announcement

The following items should be prepared before the board's resolution is announced and released simultaneously with it.

1. A carefully written notice which will inform parents and students whether they may complete the academic year without difficulty or whether the college is contemplating an accelerated term or a premature closing, *i.e.*, before its academic obligations are completed
2. A letter to all currently enrolled students assuring them that every effort will be made to work out the best option for them in terms of degree completion or transfer
3. A letter to "stop-outs" with 15 or fewer credits left for the degree indicating that this may be their last opportunity to receive a degree from the college
4. A letter to alumni assuring them that their academic records will be available and that they will be informed when a depository institution is chosen. To forestall a large number of immediate requests for transcripts, it may be useful to remind alumni that their personal copy of a transcript cannot be used for official purposes such as government employment or graduate school. Only a certified transcript issued by the college directly to the requesting agency is acceptable
5. A letter to prospective students and their parents announcing the closing
6. A letter to faculty and staff indicating that every effort will be made to assist them in finding new employment

7. A letter to individual grantors and donors, especially those with life income trusts insuring them of the safety and integrity of their income source
8. A letter to creditors indicating whether there is any problem in making ordinary payments or that the college is seeking protection of the bankruptcy statutes.

Checklist for Notification

In addition to the persons listed above, the following persons and agencies should be sent formal notification of the college's closing:

- Office of Institutional Eligibility, U.S. Department of Education, 400 Maryland Avenue, S.W., Washington, D.C. 20202
- Regional Office, U.S. Department of Education
- State Department of Education/Higher Education
- State Guaranteed Loan and Scholarship Programs
- Foundation/corporate donors
- Accrediting agencies
- Organizations of which the college is a member
- Area colleges, especially those with whom the college has scheduled athletic or other extra-curricular activities
- Student aid organizations
- Contractors, vendors, and holders of service contracts
- Local and state law enforcement agencies
- Local and county officials—mayor, state and federal legislators
- Veteran's Administration
- Social Security Administration
- The state's Secretary of State
- Chamber of Commerce

It is of utmost importance to be responsive to the requests for information from federal and state financial aid officials. Internal federal guidelines require a "flash" audit of non-responsive institutions. Officials can be helpful if the college is open to inquiry and seems to be handling its affairs in a responsible manner.

E. After The Announcement

Even when the trustees have announced that the college will close, forces both within and outside of the college may try to overturn the decision. The president or chief executive in charge of the closing can expect to be the focus not only of anger and bitterness but also the recipient of various well-intentioned and enthusiastic schemes to keep the college open. It requires the highest degree of leadership, thoughtful planning and careful administration to minimize the interference of the college's various constituencies as the process of closure is completed.

The following comment comes from an administrator who was chosen to serve as acting president during the closing of a college.

Preservation of the equanimity of the person presiding over a closing should be a high priority item. Clinging to any of the assumptions listed below will be counter-productive:

1. All constituents want the enterprise to die with dignity.
2. Students, faculty and staff will applaud a closing decision just because it was openly arrived at.
3. Creditors will not be hostile to any bankruptcy proposal.
4. Suppliers will deliver commodities during the period between announcement and closing.
5. Theft of school property will not be a problem.
6. Management of a closing is easy.
7. Purveyors of miracle solutions will not beat a path to your office.
8. Management of a closing is easy.
9. The number of alumni donors would increase if only they knew the "truth" about the school's needs . . .

While a certain percentage of a closing school's constituency sincerely wants to be of assistance in the hour of need, there are other, less benevolent perceptions. The aggrieved faculty member who sees the closing as part of a giant conspiracy; the estranged alumnus who feels that the problem stems from inept management; the alienated student who believes that he has been misled into attending . . . all form part of the fabric of a constituency which is hostile to the

board's decision. Vengeance may not be a viable motive for this segment of people, but their presence could be a source of anxiety for those who want nothing more than an orderly closing procedure . . .

Finally, a person who presides over a closing needs to "make tracks." A careful log of decisions, activities and events will be useful in the event of court challenges or later inquiries from federal agencies or trustees.⁴

Closing clearly is a traumatic event in the lives of those it affects. It falls to the chief executive and senior staff to prepare for and deal with new patterns of behavior they will confront from students, staff, faculty, and other constituents. All must understand that the situation is *not* "business as usual" and that they must be prepared to help the college close with the minimum of personal and professional damage possible. The management of a college closing can in some instances be more akin to disaster control than to the orderly process which this sourcebook attempts to describe. A section on the "pathology" of closing is given at the end of this chapter.

The Organization of a Closing

When the decision to close has been made, contingency plans and timetables should be drawn up which reflect the realities of cash flow, debt service, employment contracts, student transfer needs, outplacement of faculty and staff, and maintenance of facilities.

There are two major administrative problems in every planned closing:

1. Senior staff members have ongoing responsibilities which, in the normal operation of the college, would occupy their working day. The extra demand of an orderly closing will add new burdens without the hope of increased compensation, promotion, or job security.
2. The most able administrators may have job offers before the college closes. Some may delay their leaving out of institutional loyalty; most cannot afford to wait.

The three senior administrators who can most likely slough off some of their normal activities are the president (who need no longer be engaged in fund-raising), the director of admissions, and the director of development. The

⁴Everett Hadley, correspondence with authors, December, 1980.

alumni director may also find that some regular responsibilities are no longer of concern.

In the organization of a closing it may be useful for the president to retain responsibility for the corporate/legal problems and delegate to these senior staff members the day-to-day coordination of the closing process, especially for "human resources" problems, e.g. facilitating graduation and transfer of students to other colleges, setting up outplacement procedures for faculty, assuring adequacy and availability of records, and so on.

To gain continuity as staff depart, a "Task Force" model in which several people are responsible for the completion of a job assists in cutting across the normal "vertical" administrative and organizational lines. In a Task Force structure the group as a whole is aware of individual performance and can bring pressure to bear on those who are not getting the job done. Finally, a Task Force tends to eliminate the need for one person to make decisions in isolation from the opinions of others.

An Academic Affairs Task Force can facilitate the transfer of present and prospective students to other colleges. Members of the Task Force might include members of the admissions staff, the financial aid officer, the chief academic officer, the registrar, members of the college's curriculum or academic affairs committee, student services and/or counseling staff, and students.

An Outplacement Task Force can assist faculty and staff to find new employment. Members of the Task Force might include the Academic Dean, the career counseling/placement specialist, members of the Faculty Affairs Committee, representative faculty, and the alumni officer.

The college's placement/career planning staff should take the lead in assisting faculty and staff, write resumes, fill out unemployment forms, arrange job marts, etc.

Trustees and alumni, especially those with local business contacts, can be actively involved in assisting nonprofessionals and business office staff in making contact with local employers.

A Resource Control Task Force can inventory and plan the sale or transfer of assets, records, etc. The business manager, registrar, librarian and maintenance staff are the most likely members of the Resource Control Task Force.

An External & Legal Affairs Task Force can coordinate relations with creditors, courts, press, agencies, and alumni. The college attorney, public relations/development staff and the financial aid

officer should provide support services to the president and the trustees in their dealing with the public, with government agencies, and other organizations outside the college community.

F. Academic Affairs

During a closing the academic affairs program develops a double focus:

1. Assisting students to complete programs and earn their degrees as expediently as possible
2. Assisting students in transferring to another institution once the college ceases operations.

Completing Graduation Requirements

The experience of several institutions which closed indicated that the registrar's office will be kept extremely busy by students who are currently enrolled, by drop-outs, and by stop-outs who will want to know if they will be able to graduate before the college closes and, if not, what their transfer status is.

The Immaculate Heart College case is instructive. Normally the college graduated about 120 seniors. In its final year of operation — after the announcement that it would close — Immaculate Heart College graduated 225 students. Colleges with a high percentage of commuting students are likely to face similar demands from stop-outs.

Given the experience of colleges which have closed it is likely that the registrar's office should be prepared to handle greatly increased student traffic. Chapter 8 deals with the registrar and student records in some detail.

Graduation Monitor Checklist

1. Examine the records of all students classified as juniors and seniors (sophomores in the case of two-year programs).
2. Identify all students who have completed all requirements except those of the last academic term.
3. Determine which courses should be offered during the final academic term(s) to facilitate graduation for these students.

4. If the college cannot offer all the courses which these students need in order to graduate, determine which courses can be reasonably substituted for those usually required.

Student anxiety and anger may be at higher levels than usual during the final closing term. It may be wise to establish an appeals procedure for those cases in which the student disagrees with the registrar's office about which and how many courses he or she needs in order to graduate.

Scheduling Courses in the Final Term(s)

Good judgment is essential when scheduling course offerings for the final academic term(s). The courses offered should meet the needs of as many students as possible to assist them in the process of completing degree requirements or transferring.

The registrar's office (or the Task Force chosen to fulfill this function) should be closely involved in choosing which courses are to be offered in the college's final term.

It is only prudent to avoid "innovative" or special courses whose transferability may be in doubt.

Transferring to Other Institutions

A process similar to that needed for potential graduates is needed to facilitate transfer information — information which will concern the majority of students.

In the case of prospective graduates the objective is to assist as many to get their degree as possible. Similarly, in the case of prospective transfer students the object is to help as many transfer with as many credits as they can:

1. The records of sophomores and freshmen should be examined to determine which general education (core) requirements can be met by the greatest number of students.
2. The records of students who have declared majors should be examined to determine which courses they should be counseled into taking during their last term at the institution to make transferring easier for them.
3. Recommendations should be developed regarding substitution of courses to assist students in meeting requirements.

The administrative strategy for assisting students to transfer to other institutions differs depending on whether the college is heavily residential or heavily commuter. In the case of a commuter college, a transfer task force may be able to visit most of the area colleges for face-to-face visits with their admissions staff without undue expense. If this is possible they will be able to assess, in a way not possible by reading catalogs, how flexible each of the colleges is about residency requirements, transfer of credit, financial aid packages, and general institutional willingness to help. Information from such visits will be helpful in counseling students and in matching them with colleges which would best serve their needs.

The staff at a residential college which draws students from a wide geographical area may wish to draw up a list of colleges with characteristics similar to their own, *e.g.*, similar religious affiliation, single sex, academic program or atmosphere, etc. Some of these colleges should be visited for the kind of assessment mentioned above.

Foreign Student Transfer Problems

For legal reasons foreign students are often fearful about losing their status as full-time students when a college closes.

It would be useful to prepare a "coping sheet" for foreign students covering such questions as:

- How many credits or units they must be enrolled for to maintain their legal status with immigration officials?
- How many credits they need in order to transfer to another institution? Some basic skills or English as a second language courses may not be transferrable. Some colleges may only accept transfers with 30 credits — or as with California's public universities, no student may transfer with fewer than 56 credits.
- Is there a need for a TOEFL score?

Degree Completion at Other Institutions

Students who are within striking distance of completing the requirements for a degree may suffer a significant loss in both time and money when a college closes. With their investment of at least three years of work at the college, they are likely to have accumulated a number of non-transferable credits. For

example, religious studies credit may not be transferable to a state institution; grades below C are not transferable even though applicable to a local degree; credits in a major for which another college does not award a degree may not be transferrable; credit by examination or life experience may not be accepted; and so on.

In the desire to minimize the damage to such students when a closing occurs, several colleges have in the past petitioned the authorities in their respective states for permission to grant degrees for a specific period of time after the college ceases to offer instruction. The idea is that if a student can earn the necessary credits at another college within a year's time, then the closed college will award the degree. In Connecticut, for example, the State Board of Higher Education allowed the Board of Trustees of Annhurst College to award degrees until June, 1981, but on two conditions:

- a. The Board of Trustees was required to appoint an academic officer to verify to the Board of Higher Education that degree requirements were fulfilled.
- b. The Board of Trustees was required to remain in existence until the final degrees were awarded. In effect, the college, although no longer offering instruction, continued to exist as a corporate entity.

Annhurst's effort to deal fairly with students was to a large extent thwarted by federal regulations on student financial aid. Under federal regulations CFR 174.9; 174.2(b) students are eligible for federal student financial aid only if they are enrolled in an eligible program. Once the college ceases its instructional activity it loses its eligibility as a conduit for federal student financial aid, *i.e.*, a closed college no longer has eligible programs. Thus, once the college closed, a student who was matriculated for an Annhurst degree was ineligible for federal student aid *even if the student was earning the required credit at another eligible institution.*

The following is a response⁵ from the U.S. Department of Education to the question of continued financial aid eligibility of students matriculated in a college which closed:

Over the years, a consistent administrative pattern has been adopted in dealing with these statutory requirements, namely that an institution

⁵Letter from Leslie W. Ross, Chief, Institutional Eligibility Branch, Division of Eligibility and Agency Evaluation, Department of Education, dated July 11, 1980.

It should be noted that federal officials do not oppose some accommodation for students of closed colleges. But present legislation allows them no leeway in determining eligibility requirements.

must be open, actually conducting classes, and offering instruction, if it is to remain an eligible institution. These practices have been implemented as well in the so-called "Standards Regulations" (45 CFR 168.20 attached) relating to audits, records, fiscal responsibility administrative capability and refunds. Note also that 168.20 describes procedures to be followed by institutions which close or cease providing instruction.

Consequently, it follows from this consistent past practice and regulatory posture that we are unable to administratively waive these requirements.

One other reminder that seems indicated here, namely that the basic rule in student aid is that an eligible student must be enrolled in an eligible program at an eligible institution. Further, under the program guidelines (e.g., 45 CFR 190.2(a) of the BEOG Regulations), students who transfer from a closed institution must be enrolled at the latter for purposes of obtaining a degree or certificate from the school where they are actually attending classes — otherwise they are not defined as "eligible students" under the current regulations.

Despite the loss of eligibility for federal financial aid, there may be some students who would suffer great financial loss if they had to complete their degree requirement at another institution. The college may wish to seek the extension of degree-granting authority even though it has lost its financial aid eligibility.

G. Protection Of Assets In The Process Of Closing

Chapter 4 of this sourcebook deals with bankruptcy as a tool for reorganization. Many financially distressed colleges do not have enough assets to use Chapter 11 of the bankruptcy act as a way to financial health. Chapter 11 may, however, be useful in preventing real estate, library, and equipment from being sold by creditors at bargain basement prices.

As bankruptcy laws now stand, involuntary bankruptcy proceedings cannot be initiated against an eleemosynary institution. While it may be preferable to close and liquidate the institution outside a bankruptcy court setting, individual creditors may begin to disrupt the college's plans. In that

case the protection of the bankruptcy court may be required to allow the college to "teach out" the academic year and protect assets from premature seizure.⁶

H. The Library

The library presents a special problem in a planned closing. The collection cannot be properly inventoried until the academic year is ended because students and faculty are still using it. The inventory and the subsequent sale of the library should be considered as a major item in the college's post-closing budget. The board may wish to consider whether an employment contract should be extended to the librarian or a competent assistant for three or four months beyond the closing date to insure proper disposal of the library.

The closing and sale of the library focuses on three salient questions:

1. What is in the collection?
2. How much is it worth?
3. How best may it be sold?

Appraisal of Library Holdings⁷

The library collection should not be sold hurriedly. Word of its availability may spread slowly and selling opportunities may increase with time. Before advertising the collection an appraisal of its value should be secured. Appraisers often tend to be more interested in first editions or rare books than in a general collection. Before hiring an appraiser, make sure that he or she has experience in judging the value of a liberal arts library and has some knowledge how it may be sold. *The American Book Trade Directory* published by Bowker (NY) gives a state-by-state list of appraisers of library collections. Although some dealers do not mind giving an off-the-cuff opinion of the value of one single book, dealers everywhere expect to be paid a fee for the appraisal of a collection of any size or value. An appraisal may be done on a

⁶Drawn from correspondence with Frank J. Vecchione, December 1980.

⁷Much of the material in this section is drawn from Leab and Leab, "Appraisal," *Book Collecting*, ed. Jean Peters, (New York, Bowker, 1977), pp. 183-195.

per diem of between \$150-\$400 or on a percentage of the sale value of the collection.

If the college has a fairly general collection, as most small liberal arts colleges do, an auction house appraisal is probably best. Most of the major auction houses charge between 1 percent and 1½ percent of the value of the collection to produce a written appraisal; this fee is usually refundable if the collection is sold through that house within a year. In the case of a very large or a very small collection a flat fee may be set.

At the conclusion of the job the appraiser should produce a written and signed statement of appraisal. The format of this statement is of some importance. A signed document reading "2,000 art books with an average value of \$200" is worse than useless. A good model for format is that required by the IRS for appraisal reports on items deducted as charitable contributions.

In general, an appraisal report should contain at least the following:

1. A summary of the appraiser's qualifications to appraise this particular property;
2. A statement of the value and the appraiser's definition of how that value was obtained;
3. A full and complete description of the article to be valued;
4. The bases upon which the appraisal was made, including any restrictions, understandings, or covenants limiting the use or disposition of the property;
5. The date the property was valued;
6. The signature of the appraiser and the date the appraisal was made.⁸

If the college has any doubt about the procedure which the appraiser has followed, a code of ethics has been established by the American Society of Appraisers. A copy of the code can be had by writing to the association's headquarters at 1101 17th St. N.W., Washington, D.C. 20006.

Disposing of the Collection

To receive proper market coverage for the collection, it would be wise to advertise both in trade journals such as the *American Bookseller* and the *A. B.*

⁸*Ibid.* pp. 185-188.

Bookman's Weekly as well as in more widely read higher education publications such as *Change* and *The Chronicle of Higher Education*.

Rare books or pieces of art, if they are *not* to be sold as part of the collection, should be removed before advertising or showing the collection to potential buyers to avoid misunderstanding about what is included in the collection.

Several alternatives are available for disposing of the library's holdings:

1. Advertising and securing bids for the library in its entirety
2. Dividing the holdings into subject matter areas and marketing these to interested parties
3. Selling the collection at a public auction.

The first alternative is usually the most efficient approach in that it takes the least effort. To sell the collection to several buyers or to auction the library holdings requires greater precision in the inventory and may not produce as much revenue.

In the process of securing bids, the institution's right to reject all bids should be made clear in order to protect the institution against any obligation to accept a bid which is too low.

The Inventory

A college in financial trouble has probably already cut the library staff and budget to a maintenance level. In such circumstances a complete inventory may not be feasible.

One reasonable alternative is to conduct a shelf inventory by subject area. An inventory of books on the shelf can then be compared with the shelf list cards. This will quickly identify missing titles.

As a further indication of the quality as well as the quantity of the collection, certain series or reference works that are difficult to obtain could be separately listed.

Assessment of the Value of the Collection

The value of the full collection may depend how it is sold. Three or four sections of the library may make up the bulk of its monetary value. But if these are sold separately, the balance of the collection may have little sale value.

Selling the collection in sections also involves the very labor-intensive

task of pulling the cards. This is a cost that has to be balanced against the sale price of any particular section.

Winding Down the Library Operation

Winding down involves both closing accounts and providing service. The following suggestions may be of assistance in this process:

- Continue to buy periodicals so that the collection is complete for that calendar year. Complete sets are easier to sell.
- Cancel standing orders for yearbooks and reference works with the current volume.
- Set a date to stop ordering new books based on whether the purchase will be received in time to be used in the college's final semester.
- An "amnesty" for book fines should be announced for the final two weeks of the college's last regular session so as to maximize the number of returns to the collection.
- Gift books, unless they are on the purchase list, should be left unprocessed. A sale of these and other remainders might coincide with an Alumni Day or a special day for Friends of the Library.

Security of the Collection

The college library, even in normal times, is a natural target for theft. This is even more the case when the college is closing. Real or imagined grievances on the part of the faculty, staff, and students may erode the usual moral restraints against outright theft. To insure the security of the collection it may be necessary to change locks and put rare and valuable items in locked cabinets or closets.

Colleges buying a collection often make it a practice to retain the librarian at the closing college as a consultant to insure the integrity of the collection. It is also wise to move the books as quickly as possible.

Unique Items in the Library

Most college libraries maintain at least one copy of every thesis written by one of their students. These are listed in published indexes and some 15 to 20

inter-library loan requests are made for them each year. These unique items should not be sold unless as a set to another college or university.

I. Alumni Association

If the alumni association is not separately incorporated, it may wish to take this step before the college closes. Unless the association is incorporated as a tax-exempt organization, gifts and donations are not tax deductible.

The closing of the college raises the larger question of what role the alumni association might play in continuing the college's traditions, holding reunions, and in some cases, serving as a survivor corporation to receive the college's assets after liquidation.

It may be to the development and fund raising interests of another college of the same denomination to receive the alumni records and play host to annual reunions.

Alumni may continue to honor their pledges even after the closing is announced. It would be appropriate to stop sending reminders.

Mailings

The letter to the alumni announcing the closing should include a reference to the continued availability of transcripts and the fact that they will be informed where the college's records will be kept.

To prevent an undue number of requests for transcripts, it may be useful to add that for official purposes — graduate school, government employment, etc. — only a transcript issued by the school itself is acceptable.

Alumni and the Closing

Alumni, especially those living near the college, may be of assistance in helping faculty and staff find employment in industry and government.

J: The Pathology Of Closing^{*}

Closing a college is not a routine management exercise. The incentives which a good manager uses to motivate his or her staff are no longer available in the college's final days. A president is unlikely to have the funds to reward good performance and the hard-working employee has no hope of promotion. Nor does the threat of dismissal carry much weight. In the closing days of a college's life even a poor performance may be better than none at all. The key element in an orderly closing is loyalty and trust. At some institutions, the bonds of loyalty are tighter than at others. The atmosphere which surrounded the closings of Mount Saint Mary's and Immaculate Heart was calm, orderly, even loving. None of those adjectives could be used to describe the Windham College closing. As a rule of thumb a college will die as it has lived. Whatever weaknesses in administration or morale were present in the college's final years will only be magnified in its closing. What follows is a "cautionary tale" rather than a set of events to be found at every college closing.

1. The timing and manner of closing can trigger anger and resentment, often expressed in damage to physical plant and theft of property. If payrolls have been missed, employees may reimburse themselves "in kind." Deliberate malice may express itself in destruction of records and spreading of rumors and lies.
2. Staff turnover will be high. As key people are lost in the business office or financial aid office, recordkeeping may become haphazard. Bills and financial aid awards may be contested with no record to determine who is in the right.

As of this writing, the bankruptcy trustee at one college has refused to issue academic transcripts to about 200 students who have unpaid bills. The tragedy here is that many of those "unpaid bills" are disputed because of sloppy record-keeping during the college's last year of operation. At another institution, creditors attempted to seize students' personal property to satisfy the college's obligations.

3. Closings have more than their fair share of staff fatigue and burnout. People are asked to perform tasks which are outside both job title and ordinary experience. Staff may make up data rather than do the necessary research. Jobs reported done are left undone.

^{*}This section draws heavily on the experience and comments of Dr. Larrimore Crockett of the Vermont Higher Education Council.

4. Uncertainty about new employment, bitterness toward inept management, and generalized anxiety may cause health problems among faculty and staff. Use of alcohol, long lunches, and early leaving times may cut into staff performance.

Some of these problems are amenable to administrative solution. Ladycliff College, for example, produced a daily bulletin which laid rumors to rest and gave accurate information about meetings with admissions personnel from other colleges, placement sessions, and so on. Other problems can only be endured. The one key element in keeping a college together in its closing days is to have a chief executive who commands the loyalty of at least the administrative staff. No other trustee decision is as important in a closing as the choice of the person who will preside over it.

SELECTED GUIDELINES, INSTITUTIONAL
POLICIES AND PROCEDURES

Recommended Institutional Regulations on Academic Freedom and Tenure

(Excerpt)

4. TERMINATION OF APPOINTMENTS BY THE INSTITUTION

- (a) Termination of an appointment with continuous tenure, or of a probationary or special appointment before the end of the specified term, may be effected by the institution only for adequate cause.
- (b) If termination takes the form of a dismissal for cause, it will be pursuant to the procedure specified in Regulation 5.

Financial Exigency

- (c) (1) Termination of an appointment with continuous tenure, or of a probationary or special appointment before the end of the specified term, may occur under extraordinary circumstances because of a demonstrably *bona fide* financial exigency, i.e., an imminent financial crisis which threatens the survival of the institution as a whole and which cannot be alleviated by less drastic means.

[NOTE: Each institution in adopting regulations on financial exigency will need to decide how to share and allocate the hard judgments and decisions that are necessary in such a crisis.

As a first step, there should be a faculty body which participates in the decision that a condition of financial exigency exists or is imminent,⁵ and that all feasible alternatives to termination of appointments have been pursued.

⁴This committee, which can be the grievance committee noted in Regulation 15, is to be an elected faculty body. Similarly, the members of the committees noted in Regulations 4(c)(2), 4(d)(3), and 10 are to be elected. A committee of faculty members appointed by an appropriate elected faculty body can substitute for a committee that is elected directly. [Preceding note adopted by Committee A in June 1990.]

⁵See "The Role of the Faculty in Budgetary and Salary Matters" (AAUP Bulletin 62 [1976]: 379-81), and especially the following passages:

The faculty should participate both in the preparation of the total institutional budget and (within the framework of the total budget) in decisions relevant to the further apportioning of its specific fiscal divisions (salaries, academic programs, tuition, physical plant and grounds, etc.). The soundness of resulting decisions should be enhanced if an elected representative committee of the faculty participates in deciding on the overall allocation of institutional resources and the proportion to be devoted directly to the academic program. This committee should be given access to all information that it requires to perform its task effectively, and it should have the opportunity to confer periodically with representatives of the administration and governing board....

Judgments determining where within the overall academic program termination of appointments may occur involve considerations of educational policy, including affirmative action, as well as of faculty status, and should therefore be the primary responsibility of the faculty or of an appropriate faculty body.⁶ The faculty or an appropriate faculty body should also exercise primary responsibility in determining the criteria for identifying the individuals whose appointments are to be terminated. These criteria may appropriately include considerations of length of service.

The responsibility for identifying individuals whose appointments are to be terminated should be committed to a person or group designated or approved by the faculty. The allocation of this responsibility may vary according to the size and character of the institution, the extent of the terminations to be made, or other considerations of fairness in judgment. The case of a faculty member given notice of proposed termination of appointment will be governed by the following procedure.]

(2) If the administration issues notice to a particular faculty member of an intention to terminate the appointment because of financial exigency, the faculty member will have the right to a full hearing before a faculty committee. The hearing need not conform in all respects with a proceeding conducted pursuant to Regulation 5, but the essentials of an on-the-record adjudicative hearing will be observed. The issues in this hearing may include:

- (i) The existence and extent of the condition of financial exigency. The burden will rest on the administration to prove the existence and extent of the condition. The findings of a faculty committee in a previous proceeding involving the same issue may be introduced.
- (ii) The validity of the educational judgments and the criteria for identification for termination; but the recommendations of a faculty body on these matters will be considered presumptively valid.
- (iii) Whether the criteria are being properly applied in the individual case.

(3) If the institution, because of financial exigency, terminates appointments, it will not at the same time make new appointments except in extraordinary circumstances where a serious distortion in the academic program would otherwise result. The appointment of a faculty member with tenure will not be terminated in favor of retaining a faculty member without tenure, except in extraordinary circumstances where a serious distortion of the academic program would otherwise result.

(4) Before terminating an appointment because of financial exigency, the institution, with faculty participation, will make every effort to place the faculty member concerned in another suitable position within the institution.

(5) In all cases of termination of appointment because of financial exigency, the faculty member concerned will be given notice or severance salary not less than as prescribed in Regulation 8.

(6) In all cases of termination of appointment because of financial exigency, the place of the faculty member concerned will not be filled by a replacement within a period of three years,

Circumstances of financial exigency obviously pose special problems. At institutions experiencing major threats to their continued financial support, the faculty should be informed as early and specifically as possible of significant impending financial difficulties. The faculty—with substantial representation from its nontenured as well as its tenured members, since it is the former who are likely to bear the brunt of the reduction—should participate at the department, college or professional school, and institutionwide levels in key decisions as to the future of the institution and of specific academic programs within the institution. The faculty, employing accepted standards of due process, should assume primary responsibility for determining the status of individual faculty members.

⁶See "Joint Statement on Government of Colleges and Universities" (*Academe* 76 [May-June 1990]: 45-48), and especially the following passage:

Faculty status and related matters are primarily a faculty responsibility; this area includes appointments, reappointments, decisions not to reappoint, promotions, the granting of tenure, and dismissal. The primary responsibility of the faculty for such matters is based upon the fact that its judgment is central to general educational policy.

unless the released faculty member has been offered reinstatement and a reasonable time in which to accept or decline it.

Discontinuance of Program or Department Not Mandated by Financial Exigency?

- (d) Termination of an appointment with continuous tenure, or of a probationary or special appointment before the end of the specified term, may occur as a result of *bona fide* formal discontinuance of a program or department of instruction. The following standards and procedures will apply.

- (1) The decision to discontinue formally a program or department of instruction will be based essentially upon educational considerations, as determined primarily by the faculty as a whole or an appropriate committee thereof.

[NOTE: "Educational considerations" do not include cyclical or temporary variations in enrollment. They must reflect long-range judgments that the educational mission of the institution as a whole will be enhanced by the discontinuance.]

- (2) Before the administration issues notice to a faculty member of its intention to terminate an appointment because of formal discontinuance of a program or department of instruction, the institution will make every effort to place the faculty member concerned in another suitable position. If placement in another position would be facilitated by a reasonable period of training, financial and other support for such training will be proffered. If no position is available within the institution, with or without retraining, the faculty member's appointment then may be terminated, but only with provision for severance salary equitably adjusted to the faculty member's length of past and potential service.

[NOTE: When an institution proposes to discontinue a program or department of instruction, it should plan to bear the costs of relocating, training, or otherwise compensating faculty members adversely affected.]

- (3) A faculty member may appeal a proposed relocation or termination resulting from a discontinuance and has a right to a full hearing before a faculty committee. The hearing need not conform in all respects with a proceeding conducted pursuant to Regulation 5, but the essentials of an on-the-record adjudicative hearing will be observed. The issues in such a hearing may include the institution's failure to satisfy any of the conditions specified in Regulation 4(d). In such a hearing a faculty determination that a program or department is to be discontinued will be considered presumptively valid, but the burden of proof on other issues will rest on the administration.

Termination for Medical Reasons

- (e) Termination of an appointment with tenure, or of a probationary or special appointment before the end of the period of appointment, for medical reasons, will be based upon clear and convincing medical evidence that the faculty member cannot continue to fulfill the terms and conditions of the appointment. The decision to terminate will be reached only after there has been appropriate consultation and after the faculty member concerned, or someone representing the faculty member, has been informed of the basis of the proposed action and has been afforded an opportunity to present the faculty member's position and to respond to the evidence. If the faculty member so requests, the evidence will be reviewed by the Faculty Committee on Academic Freedom and Tenure [or whatever title it may have] before a final decision is made by the governing board on the recommendation of the administration. The faculty member will be given severance salary not less than as prescribed in Regulation 8.

Review

- (f) In cases of termination of appointment, the governing board will be available for ultimate review.

⁷When discontinuance of a program or department is mandated by financial exigency of the institution, the standards of Regulation 4(c) above will apply.

On Institutional Problems Resulting from Financial Exigency: Some Operating Guidelines

The guidelines which follow reflect Association policy as set forth in the Recommended Institutional Regulations on Academic Freedom and Tenure, The Role of the Faculty in Budgetary and Salary Matters, and other policy documents. They were formulated by the Association's staff, in consultation with the Joint Committee on Financial Exigency, Committee A on Academic Freedom and Tenure, and Committee T on College and University Government. They were first issued in 1971 and reissued in slightly revised form in 1972. The current text includes revisions approved by Committee A in 1978.

1. There should be early, careful, and meaningful faculty involvement in decisions relating to the reduction of instructional and research programs. The financial conditions that bear on such decisions should not be allowed to obscure the fact that instruction and research constitute the essential reason for the existence of the university.

2. Given a decision to reduce the overall academic program, it should then become the primary responsibility of the faculty to determine where within the program reductions should be made. Before any such determination becomes final, those whose life's work stands to be adversely affected should have the right to be heard.

3. Among the various considerations, difficult and often competing, that have to be taken into account in deciding upon particular reductions, the retention of a viable academic program should necessarily come first. Particular reductions should follow considered advice from the concerned departments, or other units of academic concentration, on the short-term and long-term viability of reduced programs.

4. As particular reductions are considered, rights under academic tenure should be protected. The service of a tenured professor should not be terminated in favor of retaining someone without tenure who may at a particular moment seem to be more productive. Tenured faculty members should be given every opportunity, in accordance with Regulation 4(c) of the Association's *Recommended Institutional Regulations on Academic Freedom and Tenure*,¹ to readapt within a department or elsewhere within the institution; institutional resources should be made available for assistance in readaptation.

¹The text of *Recommended Institutional Regulation 4(c)*, is as follows:

- (c) (1) Termination of an appointment with continuous tenure, or of a probationary or special appointment before the end of the specified term, may occur under extraordinary circumstances because of a demonstrably *bona fide* financial exigency, i.e., an imminent financial crisis which threatens the survival of the institution as a whole and which cannot be alleviated by less drastic means.

[NOTE: Each institution in adopting regulations on financial exigency will need to decide how to share and allocate the hard judgments and decisions that are necessary in such a crisis.

As a first step, there should be a faculty body which participates in the decision that a condition of financial exigency exists or is imminent, and that all feasible alternatives to termination of appointments have been pursued.

Judgments determining where within the overall academic program termination of appointments may occur involve considerations of educational policy, including affirmative action, as well as of faculty status, and should therefore be the primary responsibility of the faculty or of an appropriate faculty body.

5. In some cases, an arrangement for the early retirement of a tenured faculty member, by investing appropriate additional institutional funds into the individual's retirement income (ordinarily feasible only when social security benefits begin), may prove to be desirable if the faculty member is agreeable to it.

6. In those cases where there is no realistic choice other than to terminate the services of a tenured faculty member, the granting of at least a year of notice should be afforded high financial priority.

7. The granting of adequate notice to nontenured faculty should also be afforded high financial priority. The nonreappointment of nontenured faculty, when dictated by financial exigency, should be a consideration independent of the procedural standard outlined in *Recommended Institutional Regulation 4(c)*, with one exception: when the need to make reductions has demonstrably emerged after the appropriate date by which notice should be given, financial compensation to the degree of lateness of notice should be awarded when reappointment is not feasible.

8. A change from full-time to part-time service, on grounds of financial exigency, may occasionally be a feature of an acceptable settlement, but in and of itself such a change should not be regarded as an alternative to the protections set forth in the *Recommended Institutional Regulation 4(c)* or as a substitute for adequate notice.

9. When, in the context of financial exigency, one institution merges with another, or purchases its assets, the negotiations leading to merger or purchase should include every effort to recognize the terms of appointment of all faculty members involved. When a faculty member who has held tenure can be offered only a term appointment following a merger or purchase, the faculty member should have the alternative of resigning and receiving at least a year of severance salary.

10. When financial exigency is so dire as to warrant cessation of operation, the institution should make every effort in settling its affairs to assist those engaged in the academic process so that, with minimal injury, they can continue their work elsewhere.

The faculty or an appropriate faculty body should also exercise primary responsibility in determining the criteria for identifying the individuals whose appointments are to be terminated. These criteria may appropriately include considerations of length of service.

The responsibility for identifying individuals whose appointments are to be terminated should be committed to a person or group designated or approved by the faculty. The allocation of this responsibility may vary according to the size and character of the institution, the extent of the terminations to be made, or other considerations of fairness in judgment. The case of a faculty member given notice of proposed termination of appointment will be governed by the following procedure.]

(2) If the administration issues notice to a particular faculty member of an intention to terminate the appointment because of financial exigency, the faculty member will have the right to a full hearing before a faculty committee. The hearing need not conform in all respects with a proceeding conducted pursuant to Regulation 5, but the essentials of an on-the-record adjudicative hearing will be observed. The issues in this hearing may include:

(i) The existence and extent of the condition of financial exigency. The burden will rest on the administration to prove the existence and extent of the condition. The findings of a faculty committee in a previous proceeding involving the same issue may be introduced.

(ii) The validity of the educational judgments and the criteria for identification for termination; but the recommendations of a faculty body on these matters will be considered presumptively valid.

(iii) Whether the criteria are being properly applied in the individual case.

(3) If the institution, because of financial exigency, terminates appointments, it will not at the same time make new appointments except in extraordinary circumstances where a serious distortion in the academic program would otherwise result. The appointment of a faculty member with tenure will not be terminated in favor of retaining a faculty member without tenure, except in extraordinary circumstances where a serious distortion of the academic program would otherwise result.

(4) Before terminating an appointment because of financial exigency, the institution, with faculty participation, will make every effort to place the faculty member concerned in another suitable position within the institution.

(5) In all cases of termination of appointment because of financial exigency, the faculty member concerned will be given notice or severance salary not less than as prescribed in Regulation 8.

(6) In all cases of termination of appointment because of financial exigency, the place of the faculty member concerned will not be filled by a replacement within a period of three years, unless the released faculty member has been offered reinstatement and a reasonable time in which to accept or decline it. (*Academe* 69 [January-February 1983]: 15a-20a.)

Chapter 26

FINANCIAL EMERGENCY AND PROCEDURES FOR ELIMINATION OF AN ACADEMIC PROGRAM

(Reprinted with Permission)

Section 26-31. Financial Emergency

A. Declaration of a Financial Emergency

1. When the President believes that a financial crisis threatens the University which may justify declaration of a University-wide financial emergency, the procedures of this Section 26-31 shall be followed. The perceived financial crisis shall be an extraordinary one which threatens the institution as a whole so that the procedures prescribed for program eliminations in Sections 25-52 and 26-41 together with all other University cost-reduction procedures are not adequate to meet mandated budgetary reductions within the time required. Factors other than the financial crisis, including the desire to reorganize the University or to implement long-range educational policy, shall not be used to justify the declaration of a financial emergency. However, declaration of a financial emergency shall not preclude consideration of these factors in developing solutions for resolving the crisis.

2. The President shall call the Financial Emergency Committee into session and shall inform it of the nature and severity of the perceived financial crisis. The Financial Emergency Committee shall consist of the combined voting membership of the Senate Executive Committee and the Senate Budget Committee. The Chairperson of the Faculty Senate shall chair the Financial Emergency Committee.

3. The President, jointly with the Financial Emergency Committee, shall request that the Faculty Senate meet. At that meeting the Senate shall be informed of the nature of the financial crisis. The Senate shall determine whether, in its judgment, a declaration of financial emergency is warranted and shall record its determination in a resolution which shall be communicated to the President and to the Financial Emergency Committee.

4. The Financial Emergency Committee shall determine whether a financial crisis, as defined in paragraph A. 1 exists, and shall communicate its determination to the President.

5. The President shall, in consultation with the Financial Emergency Committee and the Faculty Senate, determine whether a financial crisis, as defined in paragraph A. 1, exists.

6. If the President and the Financial Emergency Committee agree that a financial crisis exists, a joint recommendation that a financial emergency be declared shall be forwarded to the Board of Regents, together with all supporting documents and the resolution of the Faculty Senate. If the determinations of the President and of the Financial Emergency Committee differ, both determinations together with all supporting documents and the resolution of the Faculty Senate shall be presented by the President to the Board of Regents before the Board acts on the recommendation.

7. A state of financial emergency shall exist upon declaration by the Board of Regents.

B. Financial Emergency Procedures

1. a. Upon declaration of a financial emergency, the Financial Emergency Committee shall advise the President on means by which the University can resolve the financial emergency. The Financial Emergency Committee shall concurrently apprise the Faculty Senate of its deliberations and advice.

b. The Financial Emergency Committee shall identify and evaluate cost-reduction measures designed to avoid the need for removal of faculty, and shall recommend to the President such alternatives whenever and as it deems feasible and appropriate. The Financial Emergency Committee shall consider such measures as temporary furlough of faculty as a means of meeting the financial crisis in the short term and as a means of allowing long-term measures to be taken in an orderly manner.

c. The President and the Board of Regents shall consider and implement all cost-reduction measures, short of removal of faculty, which they deem feasible and appropriate. The hiring of new faculty during a financial emergency shall be limited to extraordinary circumstances wherein an academic program would otherwise be seriously affected. Such proposed new hiring shall be stringently reviewed by the appropriate elected faculty body in each school or college.

2. If such cost-reduction measures to be implemented under paragraph B. 1. are deemed by the President to be insufficient to resolve the financial emergency, the President shall ask the Financial Emergency Committee to develop procedures for the removal of faculty.

a. In the development of these procedures, the Financial Emergency Committee shall be guided by the following principles:

(1) Such procedures shall assure maximum protection for the academic programs of the University and the educational needs of its students, consistent with the role and mission of the University.

(2) Such procedures shall be faithful to the spirit of the provisions of the Faculty Code.

(3) Such procedures shall protect the University's commitment to tenure, and shall not recommend the removal of tenured faculty, or non-tenured faculty during the term of their appointment, with less than twelve months' notice unless the Financial Emergency Committee shall have concluded that a notice of this length is not feasible.

(4) Such procedures shall protect the University's commitment to affirmative action.

(5) Such procedures shall provide for prompt and explicit notice to faculty to be removed.

(6) Such procedures shall identify the criteria and procedures, including faculty participation mechanisms, to be used by the President and the deans in the identification of programs to be eliminated and faculty to be removed.

(7) Such procedures shall provide for appropriate review and appeal mechanisms for programs identified for elimination, or faced with *de facto* elimination, during the emergency in accord with the structures of Sections 25-52 and 26-41, with the exception of their time provisions.

(8) Such procedures shall provide appropriate appeal mechanisms, through existing faculty committees, for faculty removed by reason of the financial emergency. In such appeals, affected faculty members may raise any issue related to the criteria and the procedures used in, and applied to, the removal.

(9) Such procedures shall include provisions for the placement and reinstatement of faculty who are removed, including but not limited to the following:

(a) All efforts shall be made to provide suitable placement of removed faculty elsewhere in the University.

(b) Such procedures shall provide for preferential rehiring of any removed faculty members to fill any vacancy or new position to be filled within the removed faculty's department or program, within five years of his or her removal.

(c) Any faculty member removed for reasons of financial emergency shall be appointed as an affiliate faculty member in

the department in which she or he held a regular appointment or, if the department is eliminated, in the school or college of which the department was a part, for a five-year period after removal. Affiliate faculty members so appointed shall have but not be limited to the following prerogatives: access to University library, computing, cultural, and recreational facilities equal to those enjoyed by regular faculty; continuation of graduate faculty status; and the use of University grant and contract offices. In addition, faculty removed for reasons of financial emergency shall be permitted to maintain health, life, and other insurance benefits in accordance with state law.

b. Throughout its deliberations regarding its development of procedures for the removal of faculty, the Financial Emergency Committee shall maintain close and regular consultative contact with both the President and the faculty through the Faculty Senate.

3. Enactment of Procedures Regarding Removal of Faculty.

a. The Financial Emergency Committee shall recommend to the President procedures for the removal of faculty due to financial emergency.

b. The Financial Emergency Committee shall concurrently present to the Faculty Senate its recommended procedures, and the Faculty Senate shall debate and vote to agree or disagree with them in whole or in part. A report of the Faculty Senate vote, with any related Senate resolutions, shall be forwarded to the President. If the Senate cannot achieve a quorum, those senators present shall debate and vote as if there were a quorum present; and such vote, together with the number of voters, shall be forwarded to the President as an unofficial action of the Senate.

c. The President and the Chairperson of the Financial Emergency Committee shall each recommend to the Board of Regents the adoption of procedures for removal of faculty. The report of the Faculty Senate vote with any related Senate resolutions shall also be presented to the Board of Regents.

d. Procedures for removal of faculty due to financial emergency shall be adopted upon action by the Board of Regents.

4. The President, on behalf of the Board of Regents, shall make decisions concerning the removal of faculty consistent with the procedures adopted by the Board of Regents. In arriving at those decisions the President shall consult closely with the Financial Emergency Committee.

5. Policies and procedures in the *University Handbook* which are not suspended or superseded under this Section 26-31 remain in effect.

C. Termination of a Financial Emergency

1. It is the joint responsibility of the President and the Financial Emergency Committee to monitor closely the University's financial situation throughout the duration of the financial emergency. It is the responsibility of the Chairperson of the Faculty Senate to inform the Senate on a regular basis of the University's financial situation.

2. If the President or the Financial Emergency Committee should determine that a financial crisis no longer exists, a recommendation that the financial emergency be terminated shall be submitted to the Board of Regents.

3. A state of financial emergency will cease to exist upon its termination by the Board of Regents.

S-A 49, December 4, 1975; S-A 51, June 15, 1976; S-A 67, December 5, 1983, which also replaces Executive Order No. 49, S-A 73, May 24, 1985: all with Presidential approval.

Section 26-41. Procedures for Elimination of an Academic Program

A. Identification of Programs for Review

1. Programs may be identified for elimination by the dean if budgetary constraints require a reduction in the number of programs in the University, if educational policy dictates a change in the educational priorities of the University, or if a program no longer contributes to the University's role and mission. While budgetary reasons may play a significant role in the decision to reduce the number of programs, the identification of the program(s) proposed for elimination and the subsequent decision on whether the program will be eliminated shall be based on reasons of educational policy.

2. The identification of the program(s) proposed for elimination shall be judged reasonable in terms of the principles of academic freedom and tenure, and, as appropriate, a) the nature of the budgetary problem, b) the need for change in educational priorities, and c) the overall contribution to the University's role and mission.

3. The procedures set forth in this Section shall be followed in effecting program eliminations. If the elimination of a program entails removal of faculty members having tenure or the removal of non-tenured faculty members prior to the end of the specified term of appointment, the procedures in Section 25-52 shall also be followed.

B. Review Procedures

1. The dean shall appoint a Review Committee, the members of which have been selected by the college council or other faculty-elected representative committee. The Review Committee shall be composed of no fewer than four faculty members and one student member. No member of the college council or other faculty-elected representative committee, and no faculty member or student from the program being reviewed for possible elimination, shall serve on the Review Committee. The dean shall provide the Review Committee a written statement of the reasons for proposing elimination of the program.

2. Upon the appointment of the Review Committee, the dean shall immediately notify:

a) each faculty member within the program individually in writing, and the students within the program by public notification, that a review is under way. The notification shall inform the faculty and students within the identified program of their right to present their views to the Review Committee;

b) the chairperson of the Faculty Senate; the chairperson shall announce, at the next meeting of the Senate, that a review of the identified program is under way and to whom views on the identified program can be sent.

3. In its review of the program, the Review Committee shall consider the reasons for the proposed program elimination and assess the impact, including the financial and educational consequences, of any such elimination on (a) students, (b) faculty and staff, (c) specific units identified by the Review Committee within the University, (d) the University as a whole, and (e) related activities outside the University. The Review Committee is encouraged to hold open meetings and is expected to keep the faculty of the program being reviewed informed of its progress and meeting schedules. The Review Committee shall complete its review and present its written report to the dean within 90 calendar days (excluding the period from June 16 through September 15) from its appointment.

4. The Review Committee shall keep a complete record of its proceedings and all data or documents gathered or presented to it.

5. When the Review Committee has gathered the information it believes sufficient to formulate a recommendation to the dean, it shall announce and hold an open meeting to gather final comments and responses. Prior to the open meeting, the Review Committee shall prepare a brief written summary of its procedures, findings, and preliminary conclusions. At least 48 hours before its open meeting, this summary shall be made available to each faculty member in the program being reviewed. Copies of the summary also shall be available for all who attend the meeting. Views on this summary shall be solicited at that open meeting.

6. The Review Committee shall present to the dean a written report containing a description of its procedures and the information collected, a summary of the comments at the open meeting, a statement of impacts, and its findings and recommendations on the program elimination.

7. Within 30 calendar days after the Review Committee's report is presented to the dean, the dean shall consider the report of the Review Committee, shall consult with the college council or other faculty-elected representative committee, and shall announce in writing his or her final decision, and the reasons therefor, to the students and faculty of the program. If the dean rejects any recommendation made by the Review Committee, the dean shall explain the nature and extent of his or her disagreement, if any, with each ground advanced by the Review Committee to justify its recommendations.

C. Appeal Procedures.

1. Appeal Review Panel.

a) An Appeal Review Panel consisting of 24 broadly representative faculty members each serving three-year overlapping terms shall be constituted.

b) No later than October 15 of each academic year, the Senate Executive Committee shall appoint eight faculty members (one from each Senate Group) to three-year terms to serve on the Appeal Review Panel.

2. A petition for appeal of the dean's decision to eliminate a program may be filed by any faculty member, or by any student whose career plans may arguably be affected by the program elimination. The petition(s) shall be filed with the Chairperson of the Faculty Senate within 21 calendar days after the announcement by the dean of his or her decision to eliminate the program. Announcements of program eliminations made after April 15 and during the Summer Quarter may be appealed by October 1 of the next academic year.

3. Upon receiving a petition for appeal, the Secretary of the Faculty shall immediately appoint a five-member Appeal Review Board drawn randomly from the Appeal Review Panel, the fifth member to be a student jointly recommended from ASUW and GPSS. The dean and any person filing a petition for review may challenge any member of the Appeal Review Board for bias and a judgment of the challenge by the Chairperson of the Faculty Senate shall be final.

4. Within 14 calendar days of its final constitution, the Appeal Review Board shall review the petition(s) and hear the petitioner(s). All proceedings shall be informal and conducted with dispatch. The Appeal Review Board shall keep a complete record of its proceedings and all data or documents gathered or presented to it.

5. Within 30 calendar days of its final constitution, the Appeal Review Board shall issue its written report. The report shall briefly identify the issues raised by the petitioner(s), summarize the important evidence, and state the Board's findings on the issues raised and its recommendation on the elimination. The report shall be transmitted to the petitioner(s) and to the Chair-

person of the Faculty Senate, who shall promptly transmit the report to the President and the dean.

6. Within 30 calendar days of the receipt of the written report of the Appeal Review Board, the President shall make a decision on the appeal. The President shall communicate his or her decision to the petitioner(s), the dean, and the Chairperson of the Faculty Senate.

S-A 49, December 4, 1975; S-A 57, April 3, 1978; S-A 67, December 5, 1983; S-A 73, May 24, 1985; all with Presidential approval.

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Section 25-52. Removal of Faculty for Reasons of Program Elimination

A. The removal of tenured faculty, or the removal of non-tenured faculty prior to the end of a specified term of appointment, may be effected upon program elimination within the University. Such removals shall be termed "Removal for Reasons of Program Elimination."

B. Removal for reasons of program elimination may be effected only in conformance with procedures set forth in Section 26-41, Procedures for Elimination of an Academic Program, and the provisions of this section.

C. Notification

1. Each faculty member proposed by the dean for removal for reasons of program elimination shall be so notified in writing by the dean immediately upon the appointment of the Review Committee required under Section 26-41B.

2. When the dean's decision to eliminate a program becomes final pursuant to Section 26-41B.7, and the subsequent decision is made as to which faculty members notified under Section 25-52C are to be removed, each faculty member to be removed for reason of program elimination shall be notified in writing by the dean and the effective date of such removal shall be stated. The dean shall deliver a copy of this notification contemporaneously to the Chairperson of the Adjudication Panel (Chapter 28). No faculty member shall be removed for reason of program elimination prior to the end of the academic year following the one in which a final decision is transmitted to the faculty member.

D. Appeal. Each faculty member notified of removal for reason of program elimination may engage in the administrative and conciliatory proceedings of Chapter 27. He or she may deliver an appeal to the Chairperson of the Adjudication Panel and to the Secretary of the Faculty as provided in Chapter 28, in which case a Hearing Committee shall determine whether the faculty member was properly identified as a member of the program eliminated; whether the procedures in Section 25-52 were followed; whether the decision to remove the faculty member was reasonable; and, if the faculty member so alleges, whether he or she was unlawfully discriminated against because of race, religion, color, sex, national origin, age, handicap, sexual orientation, or status as a disabled or Vietnam era veteran.

E. Placement in Another Unit. The University shall make every reasonable effort to place faculty members notified of removal for reason of program elimination in other University employment for which they are qualified with comparable terms of employment. Priority in such employment shall be given to the faculty member in accordance with University and State employment procedures. In addition to the required notification period, special assignments with pay may be provided to enable the faculty member to prepare for changed employment responsibilities.

F. Reinstatement. In the event that the academic program which has been eliminated is reinstated within a period of five years, new positions shall not be filled through normal appointment search procedures until removed faculty members qualified for the position have been offered reappointment on terms at least comparable to terms which applied to the position previously held. Such removed faculty members shall be given 30 calendar days to accept or decline an offer of reinstatement.

S-A 49, December 4, 1975; S-A 67, December 5, 1983; S-A 73, May 24, 1985: all with Presidential approval

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Chapter UWS 5

LAYOFF AND TERMINATION FOR REASONS OF FINANCIAL EMERGENCY

UWS 5.01	General	UWS 5.12	Review hearing
UWS 5.02	Financial emergency	UWS 5.13	Hearing procedure
UWS 5.03	Layoff and termination	UWS 5.14	Recommendations and review by the board
UWS 5.04	Faculty consultative committee	UWS 5.15	Board review
UWS 5.05	Consultation	UWS 5.16	Layoff status
UWS 5.06	Recommendation to the system president and the board	UWS 5.17	Alternative employment
UWS 5.07	Individual designations	UWS 5.18	Reappointment rights
UWS 5.08	Seniority	UWS 5.19	Retention of rank and salary
UWS 5.09	Notification	UWS 5.20	Rights of faculty members on layoff
UWS 5.10	Notification period	UWS 5.21	Systemwide tenure
UWS 5.11	Faculty hearing committee	UWS 5.22	Lack of faculty action

UWS 5.01 General. Notwithstanding s. 36.13 Stats., the board may lay off or terminate a tenured faculty member, or lay off or terminate a probationary faculty member prior to the end of his or her appointment, in the event of a financial emergency. Such layoffs or terminations may be made only in accord with the provisions of this chapter, and imply the retention of rights indicated herein. A nonrenewal, regardless of reasons, is not a layoff or termination under this section.

History: Cr. Register, January, 1975, No. 229, eff. 2-1-75.

UWS 5.02 Financial emergency. (1) For the purposes of this chapter, "financial emergency" is a state which may be declared by the board to exist for an institution if and only if the board finds that the following conditions exist:

(a) The total general program operations (GPR/fee) budget of the institution, excluding adjustments for salary/wage increases and for inflationary impact on nonsalary budgets, has been reduced;

(b) Institutional operation within this reduced budget requires a reduction in the number of faculty positions such that tenured faculty must be laid off, or probationary faculty must be laid off prior to the end of their respective appointments. Such a reduction in faculty positions shall be deemed required only if in the board's judgment it will have an effect substantially less detrimental to the institution's ability to fulfill its mission than would other forms of budgetary curtailment available to the institution; and

(c) The procedures described in ss. UWS 5.05 and 5.06 have been followed.

History: Cr. Register, January, 1975, No. 229, eff. 2-1-75.

UWS 5.03 Layoff and termination. For the purposes of this chapter "lay-off" is the indefinite suspension or an involuntary reduction in services and compensation of a faculty member's employment by the university of Wisconsin system. A laid off faculty member retains the rights specified in ss. UWS 5.16 through 5.21, inclusive. For the purposes of this chapter, "termination" is the permanent elimination of a faculty mem-

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ber's employment by the university of Wisconsin system. A terminated faculty member retains rights specified in ss. UWS 5.18 and 5.19.

History: Cr. Register, January, 1975, No. 229, eff. 2-1-75.

UWS 5.04 Faculty consultative committee. The faculty of each institution shall, promptly after February 1, 1975, designate or create a standing faculty committee to consult with the chancellor if at any time a declaration of financial emergency is to be considered. The committee shall consist of faculty members of the institution chosen by the faculty in a manner to be determined by the faculty. It is the right and responsibility of this committee to represent the faculty before the board if a declaration of a state of financial emergency for the institution is being considered, and to assure that the procedures of ss. UWS 5.05 and 5.06 are followed.

History: Cr. Register, January, 1975, No. 229, eff. 2-1-75.

UWS 5.05 Consultation. (1) In the event that a declaration of financial emergency is contemplated, the chancellor of the affected institution shall consult with and seek advice from the faculty committee provided for in s. UWS 5.04 at least 3 months before the matter is taken to the board. The chancellor and committee shall:

- (a) Consider identifiable alternative methods of budget reduction;
 - (b) Determine whether reductions in faculty positions under the provisions of this chapter can be made with less detriment to the institution's ability to fulfill its mission than would follow from reasonable alternative courses of action;
 - (c) Determine from which colleges, schools, departments, or programs faculty positions should be eliminated;
 - (d) Consult with faculties of colleges, schools, departments and programs potentially involved; and
 - (e) Consult with such other individuals and groups as they feel may be able to provide valuable advice.
- (1m) The committee shall prepare a report, with supporting documents, for submission to the chancellor, the faculty senate, or institutional equivalent, and the board.

(2) It shall be the primary responsibility of the faculty of the institution to establish criteria to be used by the chancellor and committee for academic program evaluations and priorities. A decision to curtail or discontinue an academic program for reasons of financial emergency shall be made in accordance with the best interests of students and the overall ability of the institution to fulfill its mission.

History: Cr. Register, January, 1975, No. 229, eff. 2-1-75.

UWS 5.06 Recommendation to the system president and the board. (1) If the chancellor decides to recommend that the board declare a state of financial emergency for the chancellor's institution, the recommendation to the system president and the board shall be accompanied by a report which shall include the following:

- (a) A statement of the procedures followed in arriving at the recommendation, showing compliance with s. UWS 5.05;

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(b) Data clearly demonstrating the need for a reduction of faculty positions in accord with the provisions of this chapter;

(c) An identification of the colleges, schools, departments or program areas in which reductions will be made, with data indicating the appropriateness of such choices;

(d) The report of the faculty committee, expressing its views on these matters; and

(e) A report of any action of the faculty senate or institutional equivalent on this matter.

(2) The chancellor and the chairman of the faculty committee, or their designees, and representatives of affected colleges, schools, departments and programs, may appear before the board at the time the recommendation is considered. Other interested parties may submit in writing alternative recommendations or challenges to any part of the report.

History: Cr. Register, January, 1975, No. 229, eff. 2-1-75.

UWS 5.07 Individual designations. Once the board has declared a state of financial emergency it shall be the primary responsibility of the tenured members of the affected department(s) to recommend which individuals are to be laid off. These recommendations shall follow seniority, as provided in s. UWS 5.08, unless a clear and convincing case is made that program needs dictate other considerations, e.g., the need to maintain diversity of specializations within a department. The department may seek the advice of other groups or individuals in formulating its recommendations. The departmental recommendation shall be forwarded to the chancellor, and the chancellor shall prepare recommendations for the system president and the board, as provided in s. UWS 5.14.

History: Cr. Register, January, 1975, No. 229, eff. 2-1-75.

UWS 5.08 Seniority. The faculty of each institution shall promptly after February 1, 1975, determine the form of seniority that is to be considered. Such a determination shall be effective uniformly throughout the institution. Seniority may be, but is not limited to, the following definitions:

(1) Without regard to rank, with seniority established by total years of service in the institution;

(2) By rank, and within rank according to total years of service in the institution; or

(3) By rank, and within rank, according to length of service in the institution at that rank.

History: Cr. Register, January, 1975, No. 229, eff. 2-1-75.

UWS 5.09 Notification. Each faculty member whose position is recommended for elimination shall receive prompt written notification from the chancellor. This statement of notification shall include:

(1) A summary of the reasons and evidence supporting the declaration of a state of financial emergency and of the reasons and data leading to the choice of the colleges, schools, departments or programs in which reductions are to be made;

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(2) A statement of the basis on which the individual position was selected for elimination (if on the basis of seniority, the criterion used and data supporting the choice; if on another basis, the data and reasons supporting that choice);

(3) A statement of the date on which the layoff is to be effective (this must be consistent with the provisions of s. UWS 5.10); and

(4) A copy of these rules and such other information or procedural regulations as the chancellor or faculty hearing committee shall deem appropriate.

History: Cr. Register, January, 1975, No. 229, eff. 2-1-75.

UWS 5.10 Notification period. (1) For an academic year appointment the effective date of layoff must coincide with the end of an academic year. For an annual appointment it shall be June 30. In either case notification must be given at least 12 months in advance of the effective date. The notification referred to here is that specified in s. UWS 5.09 informing the faculty member that his or her position has been recommended for elimination.

(2) During this period, and prior to entering layoff status (see s. UWS 5.16), the chancellor may offer as appropriate, and the faculty member may accept:

(a) Terminal leave and early retirement

(b) Relocation leave accompanied by resignation

(3) Acceptance of either of these options will terminate the faculty members association with the university of Wisconsin system at the end of the leave period.

History: Cr. Register, January, 1975, No. 229, eff. 2-1-75.

UWS 5.11 Faculty hearing committee. The faculty of each institution shall, promptly after February 1, 1975, establish a committee or designate an existing committee to serve as a hearing committee for the purposes of this chapter. The committee shall consist of faculty members of the institution chosen by the faculty in a manner to be determined by the faculty. This standing faculty committee shall operate as the hearing agent for the board pursuant to s. 227.12, Stats., and conduct the hearing, make a verbatim record of the hearing, prepare a summary of the evidence and transmit such record and summary along with its recommended findings of law and decision to the board according to s. UWS 5.14

History: Cr. Register, January, 1975, No. 229, eff. 2-1-75.

UWS 5.12 Review hearing. (1) A faculty member whose position is recommended for elimination is entitled to a hearing before the faculty hearing committee as to the appropriateness of the decision to lay off that particular individual. The existence of a state of financial emergency and the designation of the colleges, schools, departments or programs in which faculty positions are to be eliminated are not subject to review in the hearing.

(2) A hearing must be requested within 20 days of the receipt by the faculty member of notification of recommended layoff. The request shall state with particularity the grounds to be relied upon in establishing the

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impropriety of the decision. Relevant information supplementary to that contained in the notification statement may be requested. The question to be considered in the review is whether one or more of the following improper factors entered into the decision to lay off:

(a) Conduct, expressions, or beliefs on the faculty member's part which are constitutionally protected, or protected by the principles of academic freedom; or

(b) Factors proscribed by applicable state or federal law regarding fair employment practices; or

(c) Improper selection of the individual to be laid off. For the purposes of this section, "improper selection" occurs if material prejudice resulted from any of the following:

1. The procedures required by rules of the faculty or board were not followed; or

2. Available data bearing materially on the role of the faculty member in the institution were not considered; or

3. Unfounded or arbitrary assumptions of fact were made; or

4. Immaterial or improper factors other than those specified above entered into the decision.

(3) The faculty member shall present evidence on whether one or more of the improper factors specified above entered into the decision to lay off. The committee shall then consider whether the evidence presented establishes a prima facie case that such factor or factors did enter significantly into the layoff decision. If the committee finds that a prima facie case has not been established, the layoff decision shall be found to have been proper and the hearing shall be ended. The committee shall report this finding to the chancellor and faculty member.

(4) If the committee finds that a prima facie case has been established, the chancellor or designee shall be entitled to present evidence to support the layoff decision, and, thereafter, the faculty member may present evidence in rebuttal. On the basis of all the evidence presented, the committee shall make its determination as follows:

(a) The committee shall first consider whether one or more of the above specified improper factors entered significantly into the decision to lay off. Unless the committee is convinced that such factors did significantly enter into that decision, the committee shall find the decision to have been proper.

(b) If the committee believes that improper factors may have entered into the decision, but is convinced that the same decision would have been reached had the error(s) not occurred, it shall find the decision to have been proper.

(c) If the committee is convinced that improper factors entered significantly into and affected the decision, it shall be found to be improper.

(5) The committee shall report its findings and recommendations to the chancellor and the faculty member.

History: Cr. Register, January, 1975, No. 229, eff. 2-1-75.

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UWS 5.13 Hearing procedure. (1) If the faculty hearing committee requests, the chancellor shall provide legal counsel to the committee. The hearing shall be closed unless the faculty member whose position has been recommended for elimination requests an open hearing, in which case it shall be open (see s. 66.77, Stats., Open Meeting Law).

(2) The faculty hearing committee may, on motion of either party, disqualify any one of its members for cause by a majority vote. If one or more of the faculty hearing committee members disqualify themselves or are disqualified, the remaining members may select a number of other members of the faculty equal to the number who have been disqualified to serve, except that alternative methods of replacement may be specified in the rules and procedures adopted by the faculty establishing the standing committee under s. UWS 5.11. No faculty member who participated in the decision to lay off or who is a material witness may sit in on the hearing committee.

(3) The faculty member shall be given at least 10 days notice of the hearing; such hearing shall be held not later than 20 days after the request except that this time limit may be extended by mutual consent of the parties or by order of the hearing committee.

(4) The faculty member shall have access to the evidence on which the administration intends to rely to support the decision to lay off, and shall be guaranteed the following minimal procedural safeguards at the hearing:

- (a) A right to be heard in his or her own behalf;
- (b) A right to counsel and/or other representatives, and to offer witnesses;
- (c) A right to confront and cross-examine adverse witnesses;
- (d) A verbatim record of the hearing, which might be a sound recording, provided at no cost;
- (e) Written findings of fact and decision based on the hearing record; and
- (f) Admissibility of evidence governed by s. 227.10, Stats.

(5) Adjournments shall be granted to enable either party to investigate evidence as to which a valid claim of surprise is made.

History: Cr. Register, January, 1975, No. 229, eff. 2-1-75.

UWS 5.14 Recommendations and review by the board. The recommendations of the chancellor and the recommendations, if any, of the faculty hearing committee, shall be transmitted to the president of the university of Wisconsin system and to the board and acted upon as follows:

(1) If the faculty member has not requested a hearing before the faculty hearing committee, the recommendation shall be deemed proper and shall be reported for information to the system president and the board.

(2) If the faculty member has requested a hearing and the faculty hearing committee has found the decision to be proper, the report of the faculty hearing committee shall be forwarded to the system president and board by the chancellor with a recommendation. The faculty member

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may request a review by the board, and the board review panel may at its option grant a review. Unless the board review panel grants the request for review, the recommended findings of fact and decision of the standing faculty committee shall be the final decision of the board of regents.

(3) If after a hearing, the faculty hearing committee's recommended findings of fact and decision are that the initial decision was improper, the chancellor shall review the matter and give careful consideration to the committee's finding. If the chancellor accepts the committee's findings the chancellor's decision shall be final. If the chancellor contests the recommended findings that the decision was improper, the verbatim record, a summary of the evidence and the recommended findings of law and decision shall be forwarded to the board review panel (see s. UWS 5.15). The chancellor and the faculty member shall be furnished with copies of this material and shall have a reasonable opportunity to file written exceptions to such summary and proposed findings and decision and to argue with respect to them orally and in writing before the board review panel. The board review panel shall hear and decide the case in accordance with s. 227.12, Stats. The decision of the board review panel shall be final.

History: Cr. Register, January, 1975, No. 229, eff. 2-1-75.

UWS 5.15 Board review. A review panel shall be appointed by the president of the board of regents, and shall include 3 members of the board, and 2 nonvoting staff members from the academic affairs office of the university system. The panel shall review the criteria and reasoning of the chancellor and the findings and recommendations of the faculty hearing committee in each case forwarded for its review, and shall reach a decision on the recommendation to be approved. The decision shall be final and binding upon the chancellor and the faculty member affected unless one or more of the regent members of the review panel request that the decision be reviewed by the full board of regents, in which case the record shall be reviewed and a decision reached by the full board.

History: Cr. Register, January, 1975, No. 229, eff. 2-1-75.

UWS 5.16 Layoff status. (1) A faculty member whose position has been eliminated or reduced in accordance with the provisions of this chapter shall, at the end of the appropriate notice period, be placed on layoff status, unless the layoff notice has been rescinded prior to that time.

(2) The faculty member whose notice period has expired, and who is placed on layoff status shall remain on layoff status until:

(a) For probationary faculty, the probationary appointment would have expired under its own terms;

(b) For tenured faculty, one of the following occurs:

1. Reappointment to the position from which laid off. Failure to accept such reappointment would terminate the faculty member's association with the university of Wisconsin system.

2. Acceptance of an alternative continuing position in the university of Wisconsin system. Failure to accept an alternate appointment would not terminate the faculty member's association with the university of Wisconsin system.

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3. Resignation.

4. Failure by the affected faculty member to notify the chancellor not later than December 1, of each year while on layoff status as to his/her location, employment status, and desire to remain on layoff status. Failure to provide such notice of desire to remain on layoff status shall terminate the faculty member's association with the university of Wisconsin system.

History: Cr. Register, January, 1975, No. 229, eff. 2-1-75.

UWS 5.17 Alternative employment. Each institution shall devote its best efforts to securing alternative appointments within the institution in positions for which faculty laid off under this chapter are qualified under existing criteria. In addition, the university of Wisconsin system shall provide financial assistance for one year for faculty who are designated for layoff to readapt within the department or within another department of the institution, where such readaptation is feasible. Further, the university of Wisconsin system shall devote its best efforts to insure that faculty members laid off or terminated in any institution shall be made aware of openings within the system.

History: Cr. Register, January, 1975, No. 229, eff. 2-1-75.

UWS 5.18 Reappointment rights. Each institution shall establish administrative procedures and policies to insure that where layoff or terminations occur for reasons of financial emergency, no person may be employed at that institution within 3 years to perform reasonably comparable duties to those of the faculty member laid off or terminated without first offering the laid off or terminated faculty member reappointment without loss of tenure, seniority and other rights. The 3 year period shall be computed from the effective date of layoff as specified in the original notice.

History: Cr. Register, January, 1975, No. 229, eff. 2-1-75.

UWS 5.19 Retention of rank and salary. Any faculty member reappointed within 3 years after layoff or termination shall be reappointed with a rank and salary at least equivalent to the rank and salary when laid off or terminated, together with such other rights and privileges which may have accrued at that time; any faculty member relocated within an institution or within the university of Wisconsin system shall not have either rank or salary adversely affected except by consent at the time of relocation.

History: Cr. Register, January, 1975, No. 229, eff. 2-1-75.

UWS 5.20 Rights of faculty members on layoff. A faculty member on layoff status in accord with the provisions of this chapter has the reemployment rights guaranteed by ss. UWS 5.18 and 5.19, and has the following minimal rights:

(1) Such participation in fringe benefit programs as is allowed by state regulations governing rights of laid off state employees;

(2) Such continued use of campus facilities as is allowed by policies and procedures established by the department and institution; and

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(3) Such participation in departmental and institutional activities as is allowed by guidelines established by the department and institution.

History: Cr. Register, January, 1975, No. 229, eff. 2-1-75.

UWS 5.21 Systemwide tenure. The commitment to systemwide tenure within the former chapter 37 institutions shall be honored by those institutions for those eligible under s. 36.13 (4), Stats., 1973 in the event of layoff or termination under the provisions of this chapter.

History: Cr. Register, January, 1975, No. 229, eff. 2-1-75.

UWS 5.22 Lack of faculty action. If the faculty of an institution is given due notice of its rights and responsibilities under this chapter, and does not act, the chancellor may act as follows in lieu of the faculty action:

(1) If a faculty committee provided for in s. UWS 5.04 is not established, the chancellor may consult those members or representatives of the faculty he considers appropriate to satisfy the intent of s. UWS 5.05. All departments potentially involved shall be consulted and representatives of the faculty may dispute the chancellor's recommendation for a state of financial emergency before the board.

(2) If the faculty does not act to determine the form of seniority to be followed, the chancellor may designate the form. Such designation shall be effective campuswide and shall be made prior to the declaration by the board of a state of financial emergency.

(3) If an affected department or program does not recommend individuals for layoff or termination following declaration of a state of financial emergency, the chancellor shall determine the individuals to be affected, using such advice as is deemed of value.

(4) If a faculty hearing committee provided for in s. UWS 5.11 is not established by the faculty, the chancellor may appoint a committee of faculty members to provide this function.

History: Cr. Register, January, 1975, No. 229, eff. 2-1-75.

Chapter UWS 12

LAYOFF OF ACADEMIC STAFF FOR REASONS OF BUDGET
OR PROGRAM

UWS 12.01	General	UWS 12.07	Layoff status
UWS 12.02	Layoff	UWS 12.08	Alternative employment
UWS 12.03	Individual layoff decision	UWS 12.09	Reappointment rights
UWS 12.04	Hearing body	UWS 12.10	Retention of salary
UWS 12.05	Review and hearing for indefinite appointments	UWS 12.11	Rights of academic staff members on layoff
UWS 12.06	Review for fixed term and probationary academic staff members		

UWS 12.01 General. Notwithstanding s. 36.15, Stats., and chs. UWS 10 and 11, the chancellor of each institution or designee may layoff a member of the academic staff holding an indefinite appointment, or may layoff a member of the academic staff holding either a fixed term or a probationary appointment prior to the end of the appointment period, when such action is deemed necessary due to budget or program decision requiring program discontinuance, curtailment, modification, or redirection. Consistent with the limitation of academic staff appointments to an operational area, each institution shall establish policies and procedures which will ensure careful consideration of layoff decisions for reasons of budget or program. The institutional policies and procedures should recognize the constraints imposed on institutional response to an unanticipated cancellation of a contract or grant or to an unanticipated decline in an income account supporting a particular activity. The institution should take such constraints into account in designing the nature and timing of the consultation appropriate to such circumstances. The institution's policies and procedures may provide as needed the alternative forms of consultation appropriate to differences in the sources of funds for various programs or activities, or differences in the timing of information concerning a decline in resources for particular programs or activities. Program decisions made pursuant to a change in the level of resources available for a particular project shall be discussed by the chancellor or designee with such committee, committees, or committee representatives as may be specified by institutional policies and procedures as appropriate for such purposes. Decisions affecting individuals shall be communicated to the affected persons by the chancellor or designee together with a description of the change in available resources which has required the layoff decision. Nonrenewal of a probationary academic staff appointment under s. UWS 10.04, or a fixed term appointment, even if for financial reasons, is not a layoff for reasons of program or budget.

History: Cr. Register, October, 1975, No. 238, eff. 11-1-75.

UWS 12.02 Layoff. For the purpose of this chapter, "layoff" is the suspension of an academic staff member's employment by the university of Wisconsin system during the appointment period, for reasons of budget or program. A laid-off academic staff member retains the rights specified

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in ss. UWS 12.07 through 12.11, inclusive. For the purposes of s. 36.21, Stats., termination occurs at the time of layoff.

History: Cr. Register, October, 1975, No. 238, eff. 11-1-75.

UWS 12.03 Individual layoff decision. When a reduction in program of a particular operational area is required, layoffs of academic staff members with indefinite, fixed term, or probationary appointments should normally follow seniority. This presumption in favor of seniority may be overcome where program needs dictate other considerations (e.g., the need to maintain specific expertise within the program or operational area). The standard notice periods specified in s. UWS 10.05 should be used, unless there are compelling reasons to the contrary (e.g., almost immediate cutoff of funds), for layoff of probationary and fixed term appointments under this chapter. Indefinite appointees shall have 12 months' notice of layoff for reasons of budget or program, unless there are compelling reasons to the contrary.

History: Cr. Register, October, 1975, No. 238, eff. 11-1-75.

UWS 12.04 Hearing body. The chancellor of each institution shall provide for a hearing body for the purposes of this chapter. Throughout this chapter the term "hearing body" is used to indicate either a hearing committee or a hearing examiner as designated in the institutional procedures. This hearing body shall operate as the hearing agent for the chancellor pursuant to s. 227.12, Stats., and conduct the hearing, make a verbatim record of the hearing, prepare a summary of the evidence and transmit such record and summary along with findings of fact and decision to the chancellor.

History: Cr. Register, October, 1975, No. 238, eff. 11-1-75.

UWS 12.05 Review and hearing for indefinite appointments. (1) An academic staff member with an indefinite appointment whose position is to be eliminated shall be notified in writing and shall, upon request made within 20 days after such notification, be given a written statement of the reasons for the decision within 15 days, including a statement of the reasons for the determination that the budgetary or program needs should be met by curtailing or discontinuing the program in which the individual concerned works. If the academic staff member requests in writing within 20 days after receipt of said statement, he or she shall be entitled to a hearing before the hearing body. However, such a request for hearing shall not forestall a layoff under this section.

(a) The request for hearing shall specify the grounds to be used in establishing the impropriety of the decision.

(b) The staff member shall be given at least 10 days notice of such hearing. Such hearing shall be held not later than 20 days after the request except that this time limit may be extended by order of the hearing body. Anyone who participated in the decision to layoff or who is a material witness shall not serve on the hearing body.

(2) The academic staff member shall have access to the evidence on which the administration intends to rely to support the decision to layoff and shall be guaranteed the following minimal procedural safeguards at the hearing:

(a) A right to be heard in his or her defense;

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(b) A right to counsel and/or other representatives, and to offer witnesses;

(c) A right to confront and cross-examine adverse witnesses;

(d) A verbatim record of all hearings, which might be a sound recording, provided at no cost;

(e) Written findings of fact and decision based on the hearing record;

(f) Admissibility of evidence governed by s. 227.10, Stats.;

(g) The hearing shall be closed unless the staff member whose position is to be eliminated requests an open hearing, in which case it shall be open (see s. 66.77, Stats., Open Meeting Law);

(h) Adjournments shall be granted to enable either party to investigate evidence as to which a valid claim of surprise is made.

(3) If the institutional policies and procedures provide that the review and hearing be conducted by a committee, the following requirements shall be observed:

(a) The committee may, on motion of either party, disqualify any one of its members for cause by a majority vote. If one or more of the committee members disqualify themselves or are disqualified, the remaining members may select a number of other replacements equal to the number who have been disqualified to serve;

(b) If the committee requests, the chancellor shall provide legal counsel after consulting with the committee concerning its wishes in this regard. The function of legal counsel shall be to advise the committee, consult with them on legal matters, and carry out such responsibilities as shall be determined by the committee within the policies and procedures adopted by the institution.

(4) The first question to be considered in the review is whether one or more of the following factors improperly entered into the decision to lay-off:

(a) Conduct, expressions, or beliefs on the staff member's part which are constitutionally protected or actions which are consistent with an appropriate professional code of ethics;

(b) Employment practices prescribed by applicable state or federal law; or

(c) Improper consideration of the qualifications of the staff member. For the purposes of this section, "improper consideration" occurs if material prejudice resulted from any of the following:

1. The procedures required by the chancellor or board were not followed;

2. Available data bearing materially on the quality of the staff member's actual or potential performance were not considered; or

3. Unfounded, arbitrary, or irrelevant assumptions of fact were made about work or conduct.

(5) The staff member shall present evidence on whether one or more of the factors specified above improperly entered into the decision to layoff.

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The hearing body shall then consider whether the evidence presented establishes a prima facie case that such factor or factors did enter significantly into the layoff decision. If the hearing body finds that a prima facie case has not been established, the layoff decision shall be found to have been proper and the hearing shall be ended.

(6) If the hearing body finds that a prima facie case has been established, the appropriate administration officer for the operational area shall be entitled to present evidence to support the layoff decision, and, thereafter, the staff member may present evidence in rebuttal. Thereafter, on the basis of all the evidence presented, the hearing body shall make its determinations as follows:

(a) The hearing body shall first consider whether one or more of the above specified factors improperly entered into the decision to layoff. Unless the body is convinced that such factor or factors did improperly enter into that decision, the body shall find the decision to have been proper;

(b) If the hearing body is convinced that such factor or factors entered into the decision to layoff, then the body shall find that decision to be improper, unless the body is also convinced 1) that there was a bona fide program or budgetary reason(s), and that the determination of such reason(s) was made in the manner prescribed by, and in accordance with, the standards established by the institution; and 2) that the decision to layoff the particular academic staff member was in accordance with the provisions of s. UWS 12.02.

(7) In determining whether a bona fide budgetary or program reason existed for layoff of the appointment of the academic staff member concerned, the hearing body shall presume that the decision to curtail the program was made in good faith and for proper reasons. The hearing body shall not substitute its judgment or priorities for that of the administration.

(8) If the hearing body finds that the layoff was improper, it shall report this decision and its recommendation to the chancellor and to the staff member. The chancellor shall review the matter, decide whether the staff member should be laid off, and notify the hearing body and academic staff member of the decision. This decision shall be deemed final unless the board, upon request of the academic staff member, grants review based on the record.

History: Cr. Register, October, 1975, No. 238, eff. 11-1-75.

UWS 12.06 Review for fixed term and probationary academic staff members. Each institution shall establish procedures for an impartial review of the layoffs for reasons of budget or program of academic staff members with fixed term and probationary appointments. Nonrenewal is not a layoff under this section.

History: Cr. Register, October, 1975, No. 238, eff. 11-1-75.

UWS 12.07 Layoff status. (1) An academic staff member whose position has been eliminated according to the provisions of this chapter may, at the end of the appropriate notice period, be placed on layoff status, unless the layoff notice has been rescinded prior to that time. The academic staff member whose notice period has expired, and who is placed on layoff status shall remain on layoff status until,

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(a) For fixed term and probationary appointee, one of the following occurs:

1. The appointment expires under its own terms;
2. The staff member fails to accept an alternate appointment.

(b) For academic staff on indefinite appointment one of the following occurs:

1. The staff member is reappointed to the position from which laid off. Failure to accept such reappointment would terminate the academic staff member's association with the institution;

2. The staff member accepts an alternative continuing position in the institution. Failure to accept an alternate appointment would not terminate the academic staff member's association with the institution;

3. The staff member resigns;

4. The staff member fails to notify the chancellor or his/her designee not later than December 1, of each year while on layoff status, as to his/her location, employment status, and desire to remain on layoff status. Failure to provide such notice of desire to remain on layoff status shall terminate the academic staff member's association with the institution;

5. A period of 3 years lapses.

History: Cr. Register, October, 1975, No. 238, eff. 11-1-75.

UWS 12.08 Alternative employment. Each institution shall devote its best efforts to securing alternative appointments within the institution in positions for which staff laid off under this chapter are qualified under existing criteria. Each institution should seek to provide financial assistance for academic staff members who have indefinite appointments and who are to be laid off to readapt within the operational area or within another operational area of the institution where such readaptation is feasible within one year's time. Further, the university of Wisconsin system shall devote its best efforts to insure that such staff members laid off in any institution shall be made aware of openings within the system.

History: Cr. Register, October, 1975, No. 238, eff. 11-1-75.

UWS 12.09 Reappointment rights. Each institution shall establish administrative procedures and policies to insure compliance with s. 36.21, Stats., in providing that where layoffs occur for reasons of budget or program, no person may be employed in that operational area at that institution within 3 years to perform reasonably comparable duties to those of the staff member laid off without first offering the laid off staff member on layoff status reappointment without loss of rights or status. In addition, an institution shall continue for 3 years from date of layoff to offer the reappointment rights stated in this section to a laid off fixed term appointee whose appointment has expired under its own terms if such appointee notified the chancellor or his/her designee by December 1 of each year, or more frequently if institutional policies and procedures require, as to his/her location, employment status, and desire to pursue reappointment rights. Failure to provide such notification shall terminate the academic staff member's reappointment rights under this section.

History: Cr. Register, October, 1975, No. 238, eff. 11-1-75.

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UWS 12.10 Retention of salary. Any academic staff member reappointed within 3 years after layoff to reasonably comparable duties within the operational area shall be reappointed with a salary rate at least equivalent to the salary rate when laid off, together with such other rights and privileges which may have accrued at that time.

History: Cr. Register, October, 1975, No. 238, eff. 11-1-75.

UWS 12.11 Rights of academic staff members on layoff. An academic staff member on layoff status in accord with the provisions of this chapter has the reemployment rights guaranteed by s. UWS 12.09 or 12.10, and has the following minimal rights:

- (1) Such voluntary participation in fringe benefit programs as is permitted by institutional policies;
- (2) Such continued use of campus facilities as is allowed by policies and procedures established by the institution; and
- (3) Such participation in institutional activities as is allowed by the policies and procedures established by the institution.

History: Cr. Register, October, 1975, No. 238, eff. 11-1-75.

WESTERN MICHIGAN UNIVERSITY

ARTICLE 23. - LAYOFF AND RECALL

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PREAMBLE: Western and the AAUP recognize that a diverse and multifaceted professionally-qualified faculty represent a major asset. Western reaffirms its concern for the lives and careers of its faculty and its students. It agrees to this Article to provide for a fair and orderly procedure for layoff of faculty should such occur. The Chapter acknowledges that layoffs may be effected under the procedures called for in this Article. Western and the Chapter agree that layoff of faculty is a very serious step for a University to take.

Section 1: **DEFINITION.** Layoff shall be defined as the cessation of the active employment of any appointment.

Layoff may take place in the following circumstances:

- (a) When Western deems it prudent and appropriate to curtail, modify or eliminate programs, services, offerings or courses of instruction, or
- (b) When a bona fide financial crisis exists.

Laid-off persons have certain specific rights: these rights are specified in this Article and are different from the rights of active employees, employees on leave, and employees who are terminated.

Leaves of absence, the termination of faculty members on temporary and term/temporary appointments when those appointments expire, the termination of faculty members on probationary tenure track appointments for reasons of inadequate performance, and the dismissal of any faculty member for cause constitute examples (not all-inclusive) of the termination, cessation or interruption of active employment for reasons other than layoff that are not subject to the provisions of this Article.

Section 2: **ORDER OF LAYOFF.** After Western has given the 60-day notice referred to in Section 3 (a) of this Article, the Chapter and the affected departments or similar units shall have an opportunity to recommend alternatives to such anticipated action; and, if a financial crisis layoff is anticipated, Western agrees to consult with the Chapter, upon request, during the 60-day period, regarding the financial crisis. Western agrees to give serious consideration to recommendations of alternatives. Alternatives to serious consideration to recommendations of alternatives. Alternatives to layoff of individual faculty members may include but are not limited to early retirement per Article 31, Section 4, or reduced load per Article 31, Section 6, reassignment of faculty not limited to reassignment of specific individuals subject to layoff, alternate-academic year appointments, continuing education courses up to a full workload, and shared load in another program.

- a) Consistent with the operating needs of the level of organization of the University deemed appropriate by Western for layoff, Western, after such consultation as is provided for

herein, shall lay off employees holding the positions subject to layoff at such level of organization. The decision of Western to implement layoff and the determination of the level of organization at which layoff will take place shall be ratified by the Board of Trustees prior to the issuing of layoff notices to individual faculty members. Layoffs shall be in the following order, subject to the ability of those remaining faculty members, if any, to adequately perform all remaining work responsibilities assigned to that college, department, unit, program, area of other level or organization:

- (1) Faculty members on part-time temporary appointment and other non-bargaining unit faculty and graduate assistants (excluding chairpersons).
 - (2) Unit faculty members on full-time temporary (one-year) appointment.
 - (3) Unit faculty members on term/temporary (two-year) appointment.
 - (4) Non-tenured unit faculty members on tenure-track appointment in inverse order of continuous service with the University.
 - (5) Tenured unit faculty members in inverse order of continuous service with the University.
 - (6) When two or more faculty members in (a) (4) or (5) above have the same length of continuous service, the faculty member with the lesser rank shall be first to be laid off.
 - (7) When two or more faculty members in (a) (4) or (5) above have the same length of continuous service and the same rank, the department chairperson or similar officer shall determine which shall be the first to be laid off based on the operating needs of the department or similar unit. This decision shall not be grievable.
- (b) For purposes of determining continuous service of employees, prior service at the University on a full- or part-time temporary, term, term/temporary or tenure-track faculty appointment, without interruption of employment, shall be counted.
- (c) In the case of a potential layoff of a unit faculty member serving in a position at a level of organization below the level of an academic department or comparable unit (hereinafter "academic department") who has seniority in the academic department (as determined by application of Section 2 (a) and (b) to the academic department), the following procedure is to be follows:
- (1) Western shall give consideration to the retention of such faculty member in such academic department. Such

consideration shall consist of the judgment of Western with respect to the present ability of such faculty member to perform the required professional obligations of a position remaining in the academic department after the layoff(s). Upon timely request by the department, made during the 60-day notice period, Western shall consult with the department or similar academic unit during the 60-day notice period regarding the retention of such faculty members in the academic department.

- (2) With due regard for the operating needs of the academic department, the criteria for consideration for retention pursuant to this paragraph (c), as appropriate, may include, but shall not be limited to, demonstrated mastery of subject matter, teaching experience, professional experience, research, and University service.
- (3) If Western, pursuant to the provisions of the paragraph (c), makes a determination in favor of the retention of a faculty member having seniority, the following procedure shall apply: where practical, the most junior faculty member in the department performing a professional obligation which, in the judgment of Western, a faculty member having seniority has the present ability to perform shall be subject to layoff.
- (4) Review in the grievance procedure of the provisions of this paragraph (c) shall be limited to the procedural issue of whether consideration for retention was given. Such issue may be processed through Step 2 only.

Section 3: NOTICE.

- (a) 60-day Notice: Following the decision respecting the level of organization of the University appropriate for layoff, and prior to the issuance of individual layoff notices, Western shall inform, in writing, the Chapter, the college, the department or other unit, and the faculty members likely to be affected of the level of organization at which layoff will occur and of the reason(s) for the layoff(s). Such notification shall be provided at least 60 calendar days prior to the issuance of layoff notices to individual faculty members.

After the 60-day Notice, upon request, Western shall consult with the Chapter, the affected unit(s) and faculty members regarding the layoff(s) and provide them with all available data relating to such layoff(s).

- (b) Individual Notice: Western will issue written layoff notices to those faculty members subject to layoff in advance of the effective date of their layoffs. Where circumstances permit, the following notice shall be provided:
 - (1) For faculty members on temporary (one-year) or term/temporary (two-year) appointments: at least sixty

- (60) calendar days' notice if the effective date of layoff occurs within their term of appointment.
- (2) For non-tenured faculty with three (3) years' service or less on a tenure-track appointment: at least four (4) months' notice of layoff.
 - (3) For tenured faculty and faculty members on a tenure-track appointment with more than three (3) years of service: at least twelve (12) months' notice of layoff.
- (c) Notice of layoff shall be sent by certified mail and shall contain a statement of the reasons for layoff. If notice of layoff is less than the notice provided for in subdivision (b), the reasons for the shorter notice shall also be provided. A copy of the notice shall be sent to the Chapter.

When circumstances do not permit layoff notice as specified above, the faculty member shall receive pay in lieu of notice for the time remaining in the layoff notice period had notice been given as specified above.

Section 4: SPECIAL CONSIDERATION.

- (a) Prior to the effective date of layoff and for a period of two (2) years following the effective date of layoff and three (3) years in the case of laid-off faculty who held tenure at the time of layoff, Western shall give special consideration for placement within the bargaining unit at the University to a faculty member who has been notified of pending layoff, or who has been laid off, provided that a suitable vacant position is available for which Western deems the faculty member qualified.
- (b) The procedure for special consideration shall be as follows:
 - (1) Western will periodically notify each faculty member who is entitled to special consideration as provided in this Section of vacant bargaining unit faculty positions. To facilitate communication concerning this notification of vacancies, it shall be the faculty member's responsibility to ensure that the University's Academic Affairs office and Personnel office records reflect the faculty member's current address. Western's obligation to notify of vacancies under this provision shall be satisfied by sending a certified letter to the last address of record.
 - (2) A faculty member entitled to special consideration shall have the right to apply for any vacant bargaining unit faculty position for which the faculty member believes himself/herself to be qualified.
 - (3) Special consideration shall be defined as meaning that applications submitted by faculty members entitled to special consideration will be acted upon before applications submitted by other persons. To obtain such action,

a faculty member must submit the application in a timely manner and must specify in the application that the application is being submitted in accordance with the special consideration procedure.

- (4) Review in the grievance procedure of the provisions of Section 4, paragraphs (a) and (b), shall be limited to the procedural issues of: (1) whether notice of vacancies was given as provided, and (2) whether "special consideration" was given. Issue (2) may be processed through Step 2 only.
- (5) A faculty member who is hired under the special consideration procedure shall be hired with the salary, rank and appointment type of the vacant position for which he/she applied. This will not necessarily be the same salary, rank and appointment type previously held by the faculty member.
- (6) In addition to the above, a faculty member who has been notified of pending layoff, or a faculty member who has been laid off, may apply for any vacant position in the University for which he/she considers himself/herself qualified and will be considered for the position by Western on the same basis as any internal applicant for a vacant position. If the faculty member is hired, the salary and other terms of employment shall be those of the vacant position, which will probably differ from those of the previous position.
- (7) A faculty member who accepts employment under this Section shall have no further rights under this Section, but shall retain any rights he/she would otherwise have under Section 5 following.

Section 5: RECALL.

- (a) Recall offers pursuant to this Section shall be made to eligible persons in inverse order of layoff.

Western shall not add full-time faculty members in a department or similar unit in which a layoff is effective until such time as all persons eligible for recall in that department or similar unit have been offered such a recall, subject to the ability of those eligible for recall to adequately perform the teaching and other work responsibilities assigned to the department or similar unit.

For a period of two (2) years following layoff and three (3) years in the case of laid-off faculty who held tenure at the time of layoff, a faculty member removed as a result of layoff shall be recalled to the same position from which he/she was laid off should an opportunity for such recall arise. This offer shall be made prior to any announcement or notice of a vacancy. The term "same position" shall mean a position in the same department or unit equivalent in its content, duties,

responsibilities, requirements and obligations to that held by the employee at the time of layoff.

To facilitate communication concerning recall, it shall be the faculty member's responsibility to ensure that the University's Academic Affairs office and Personnel office records reflect the faculty member's current address. Western's obligation to recall a laid-off person shall be satisfied by sending a certified letter to the last address of record.

Any such recall offer must be accepted within thirty (30) working days of the date the offer is sent, such acceptance to take effect not later than the beginning of the semester immediately following the date the offer was made. In the event such recall offer is not accepted within said thirty (30) days, the faculty member shall be deemed to have refused recall and to have no further rights arising out of past employment at the University.

Section 6: FACULTY RIGHTS.

- (a) In the event a recall offer under Section 5 is accepted, the faculty member, upon commencement of active employment, shall receive the following benefits:
 - (1) Incremented base salary as if employment had been continuous.
 - (2) The same rank and appointment status held before layoff.
 - (3) The same continuous service (seniority) for purposes of layoff as held on the date of layoff.
 - (4) Years of service for promotion and tenure decisions as held upon date of layoff.
 - (5) Sick leave accruals as held on the date of layoff.
- (b) A person on layoff status whose recall rights as provided herein have not expired shall have the right: (1) to purchase through Western insurance coverage identical to that offered other unit faculty at group rates, but with the full cost paid by the laid-off person, and (2) to file timely grievances in accordance with the provisions of this Agreement.
- (c) On a annual basis, Western will provide the Chapter with a list of faculty members to whom the provisions of this Section apply. The Chapter shall be provided with a copy of any recall offers made pursuant to provisions of this Section.

Section 7: GRIEVANCES. Review in the grievance procedure of the provisions of this Article shall be limited to issues of whether contractual procedures have been complied with. The decision of Western to implement layoff and its determination of the level of organization at which layoff will take place are not grievable.

UNIVERSITY OF CONNECTICUT
COLLECTIVE BARGAINING AGREEMENT

ARTICLE 14

REDUCTION OF STAFF FOR
DISCONTINUANCE OF PROGRAMS AND
FINANCIAL EXIGENCY

14.1 Whenever the discontinuance of faculty is contemplated for reasons consonant with the long-range educational mission of the University or for what the Administration believes to be a bona fide financial exigency, the procedures below shall be followed.

14.2 Should the Administration determine that the fiscal position of the University has deteriorated to an extent which warrants informing the Board of Trustees of a financial exigency which may require a reduction in the faculty, the Administration shall notify the AAUP promptly.

14.3 At a time mutually agreeable to both parties, but in no case less than five (5) days before presentation to the Board of Trustees, a meeting shall be held between the President of the University, the Provost and the appropriate Vice President(s) and the AAUP for the purpose of reviewing the entire budgetary outlook of the University. The President, the Provost and the appropriate Vice President(s) shall document the financial position of the University and its reasons for its declaration to the AAUP along with the recommendations for alleviating the situation.

14.4 At that or a subsequent meeting, but prior to the meeting with

the Board, the AAUP may present to the Provost and Vice President(s) its own recommendations for resolving the exigency, in the hope that the recommendations given to the Board are the joint recommendations of the parties.

14.5 In the event that the Administration wishes to present to the Board recommendations with which the AAUP does not concur, the AAUP shall be allowed to present to the Board or the appropriate committee of the Board its own recommendations prior to the time when the Board is to determine what course of action it shall take.

14.6 If the course of action adopted by the Board requires discontinuation or consolidation of existing programs with the resultant elimination of faculty, the Provost, the AAUP, the Deans of the affected schools, the Head(s) of the affected department(s) and a faculty representative chosen by the Senate Executive Committee shall meet to identify faculty whose termination is to be recommended to the President. In the course of such discussions regarding which faculty shall be terminated, the participants shall take into consideration, and where possible recommend, such things as shared or reduced load with proportionate reduc-

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tion in salary, administrative assignment, the feasibility of early retirement, and the possibility of reassigning the faculty member, provided he/she is suitably qualified, to another unit of higher education.

14.7 The following criteria shall apply to the identification of faculty whose termination is to be recommended:

A. Except where demonstrable and serious distortion of an academic program would result, nontenured faculty in an affected program will be terminated before any tenured faculty member is terminated.

B. In identifying tenured faculty whose termination is to be recommended, the following shall be taken into account: the academic needs of the affected program(s); the merit of the affected faculty as attested by peer reviews of scholarship, teaching, and service; the age and length of service of the affected faculty; the Affirmative Action aims of the University.

C. In all cases requiring the termination of faculty, primary consideration shall be given to the University's responsibility to offer an appropriate range of courses and programs.

14.8 The following procedure shall govern the case of any faculty member whose termination is recommended to the President:

A. Prompt notice of the recommendation to terminate will be given.

B. The faculty member given such notice shall have the right to a hearing under the grievance procedure specified in Article XV.Q. of the University of Connecticut *Laws and By-Laws*, 12th edition, revised (1985).

14.9 If because of financial exigency the University terminates appointments

it will not at the same time make new appointments in the same department except where a serious distortion in a program of the University would otherwise result.

14.10 In all cases of termination because of financial exigency or program discontinuance the place of the faculty member concerned will not be filled by a replacement within a period of two (2) years.

14.11 A. During a period of two (2) years from the date of termination, the terminated faculty member shall be offered reemployment in the same position should the position be restored. Any faculty member so recalled shall have thirty (30) days in which to accept the offer. Both the offer of reemployment and its acceptance or rejection shall be made by registered mail.

B. If the faculty member was enrolled in a health insurance program at the time of layoff during the recall period, he/she shall be entitled to purchase health insurance benefits for up to 78 weeks following the layoff at the group rate in effect for the bargaining unit.

C. A tenured faculty member who has received notice of layoff as the result of financial exigency shall be entitled during his/her period of notice up to \$1,000 for reimbursement for fees charged by professional placement or occupational counseling services. Such fees shall be deducted from the Professional Development Fund in 19.V.

D. A tenured faculty member who has received notice of layoff shall be entitled during his/her period of notice and recall to reimbursement for course work for up to \$1,500 per semester.

The cost of reimbursement shall be deducted from the Professional Development Fund in 19.V.

14.12 Standards of Notice for Tenured and Tenure-Track Employees

A. In all cases of termination or program discontinuance because of financial exigency, the following standards of final notice or severance salary in lieu thereof shall apply: In the first year of service, three (3) months; in the second, third or fourth year of service, six (6) months; after the fourth year of service, one (1) year. Tenured faculty shall be entitled to fifteen (15) months of notice.

B. In cases of termination for reasons unrelated to financial considerations, the following standards of final notice or severance pay in lieu thereof shall apply: In the first year of service, three (3) months, in the second year of service, six (6) months; in the third year of service, one (1) year; after four (4) or more years of service, twenty-four (24) months.

Dismissal for cause is not covered under Article 14, and in no case shall a dismissal for cause be labeled a termination for reasons related to financial exigency or program change under Article 14.

NEW YORK UNIVERSITY

DECEMBER 10, 1979

RESOLVED, That the Board of Trustees approves the following procedures, previously approved by the University Senate, to govern the termination and reorganization of academic programs with the proviso that, under Section B, final authority to determine whether an academic program should be terminated or reorganized lies with the President of the University.

Procedures for Termination or Reorganization of Academic Programs

A. Consultation Procedure

Because one of the main responsibilities of the faculty is the curriculum, no program leading to a degree of certification in any school of the University should be discontinued or reorganized without the involvement of the faculty of that school in reaching the decision.

When discontinuance or reorganization of a particular program is proposed, the entire matter is to be considered by an appropriate elected standing committee of the faculty of the school concerned (e.g., Policy and Planning Committee, Academic Affairs Committee, etc.) with the President of the Student Council of the affected school as an ad hoc member.

The department concerned should have the opportunity to present a proposal for continuation and/or reorganization to the committee. Such a proposal should have the support of that department, although minority reports should be admissible for consideration.

The committee should have access to all pertinent information including, but not limited to:

- 1) The reasoning behind the proposed termination or reorganization.
- 2) The administrative history of the program, including what actions have been taken over the preceding five years which were supportive or non-supportive of the program.

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- 3) All recent academic evaluations of the program by both internal and external evaluators.
- 4) All financial data relevant to the program and related programs, including estimated costs for retaining it or recognizing it as a quality program consistent with standards of New York University, and the probable impact such expenditures would have on other programs in the school.

The committee should also allow and encourage other appropriate members of the University community to provide further information and opinions, orally or in writing.

When it has concluded its study, the committee should report to the dean of the school and to the faculty of the school.

After the committee has made its report, the faculty will have the opportunity to vote on whether the program should be maintained.

B. Decision Making

If the faculty recommends that a program be discontinued or reorganized, this should be done. If the faculty recommends that the program be maintained, and if this is not feasible, the degree, if any, to which it can be maintained/supported should be negotiated between the faculty and administration. After a final decision has been reached, the administration must issue a written report to the faculty stating the reasons for the decision.

Should the termination or reorganization involve an entire school, the above procedure would be conducted by the Faculty Council.

NEW YORK UNIVERSITY

DECEMBER 12, 1983

RESOLVED, That the Board of Trustees approves and adopts the Procedures for Treatment of Students Following Program Termination and Reorganization, appended to these minutes as Exhibit B.

Exhibit B

Procedures for Treatment of Students Following Program Termination and Reorganization.

Where, in accordance with the procedures adopted by the Board of Trustees on December 10, 1979, a final decision has been made to discontinue a program leading to a degree or certification, the University recognizes and accepts a responsibility to use all reasonable efforts to enable students enrolled in the program and making such progress toward its completion as would ordinarily entitle the student, under the rules of the school or the department, to continue in the program ("eligible student"), to receive their degree or certification in a timely manner, and without a greater expense for tuition and other institutional charges related to the program than would have been incurred had the program not been discontinued ("incremental additional expenses").

1. To fulfill its aforesaid obligations, the University Administration shall make an election either
 - a) to provide appropriate instructional resources at New York University to enable eligible students to receive in a timely manner their degrees or certifications from New York University, in the program which has been discontinued, at the degree or certification level in which they have been enrolled; or
 - b) to pay to or on behalf of such eligible students the incremental additional expenses of program completion at another institution of higher learning, which are required to enable the eligible student who is continuing to make satisfactory progress to complete the necessary program or to receive his or her next level of degree or certification from New York University (in which case any University residency requirement shall be waived) or the equivalent degree or certification from such other institutions; or
 - c) to permit each individual student to elect to proceed under option a) or b).

In the event that the University elects to proceed under option b) or c), it shall also pay, to eligible students who enroll in and successfully complete at least one semester's work toward completion of the discontinued program at another institution of higher learning in the continental United States, a one-time relocation allowance equal to 125% of the University mileage allowance for automobile travel multiplied by the number of miles that such other institution is located from New York University.

2. Where a student, prior to the final decision to discontinue the affected program, had been the holder of a teaching or research assistantship and had been given written assurance by the Dean or by the Department Chairperson (with the written approval of the Dean) of the continued availability of such assistantship for specified future years, the University shall continue to provide the assured level of assistance on the same or similar terms and conditions for the specified period. In the event that a student enrolls to complete his or her discontinued program at another institution of higher learning at which similar types of financial assistance are available to the student, the University's financial obligations shall be reduced or eliminated in proportion to such availability.

3. Where a decision concerning a program termination is imminent, the University shall so inform all students in the program. Students accepted to, but not registered for, the program shall also be informed at this time. Once a program termination is finalized, the University shall so inform applicants.

POLICIES AND PROCEDURES FOR FACULTY REDUCTIONS

I. Introduction

On _____ the Board of Trustees declared that the University was facing a financial emergency that could not be alleviated without the reduction, consolidation or elimination of some underutilized programs. Following an intensive review and recommendations by a special Trustee committee and an independent audit to confirm and evaluate the University's financial condition, the Board of Trustees met again on _____. In that meeting the Board established that the highest priority in making the necessary reductions within the Schools and Colleges must be to maintain viable programs of academic quality and to retain those faculty best able to meet the needs of the reduced programs.

These Policies and Procedures have been developed by the Deans of all the Colleges and Schools, with appropriate Faculty consultation and with the advice of the Vice President and General Counsel, to reduce to writing the considerations upon which some academic judgments have already been made and to provide fair and reasonable criteria and procedures, consistent with the tenure policy of the University, for identifying faculty members whose appointments must be terminated because of financial exigency.

II. Program Eliminations and Reductions

A. For purposes of these Policies and Procedures, a "program" or "academic program" means:

1. a College, School, department, division, or instructional unit headed by an academic administrator;
2. a coherent set of courses or program of study which leads to an academic degree;
3. a coherent set of courses or program of study which does not lead to an academic degree but which serves to educate or train students (e.g. a professional certification program or a remedial program); or

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4. a research or service unit, which may or may not educate students.

B. Each Dean, with appropriate Faculty consultation, will determine whether it is most appropriate, in light of the particular characteristics of the College or School and the purposes of these Policies and Procedures, to consider the "program" to be the College or School itself or to focus on smaller program units within the College or School.

C. Where the level of required expenditure reduction in a College or School necessitates the termination of faculty members, the Dean shall prepare a prioritized list of the programs which can be eliminated or reduced, and/or the level of reductions, while maintaining a viable and balanced program of academic quality. Considerations in making such determinations shall include current and projected student enrollments, accreditation and similar requirements, financial costs and benefits, and the impact of the elimination or reduction on the academic quality and mission of the College or School and of the University as a whole.

III. Identification of Faculty for Release

A. Program eliminations. In the case of a program elimination, every faculty member whose primary affiliation is with the program will generally be released, subject to the rights specified in Section IV below.

B. Program reductions. In the case of a program reduction, the following criteria will be used in identifying faculty members to be retained:

1. Program needs. The highest priority will be given to retaining those faculty members who are best able to meet the needs of the reduced program at the highest level of academic quality on a long-range basis. The following factors will be considered in this assessment:

- a. experience and knowledge in the courses offered in the reduced program;
- b. academic credentials;
- c. teaching load (number of sections and students taught);
- d. teaching ability;

- e. experience or knowledge in other academic areas (ability to double up); and
- f. research and scholarly quality and productivity.

2. Tenure status and diversity. While all faculty members in the program will be assessed in terms of their individual abilities to meet program needs, it is recognized that such assessments will not always yield clear and obvious decisions as to which faculty members should be retained and which should be removed. Moreover, the University has important long-range institutional interests in maintaining confidence in the tenure system and in preserving diversity and balance among the faculty members who remain. On occasion these two interests may conflict, but each should be considered, in addition to the primary interest in program needs, in identifying faculty to be retained.

a. Tenure status. While these Policies and Procedures require (for program reductions) comparisons among faculty members and assessments of their relative abilities to meet program needs, the faculty reduction decision is not equivalent to a termination for cause and does not and should not reflect adversely on the faculty members who must be released. Where the program needs assessments are substantially equal, a tenured faculty member will generally be retained in preference to a non-tenured faculty member. In no event will a faculty reduction decision be used to restrain a faculty member's exercise of his or her academic freedom. As one court has noted:

Tenure's real concern is with arbitrary dismissals based on an administrator's or a trustee's distaste for the content of a professor's teaching or research, or even for positions taken completely outside the campus setting.... Dismissals based on financial exigency, unlike those for cause or disability, are impersonal; they are unrelated to the views of the dismissed teachers. A professor whose appointment is terminated because of financial exigency will not be replaced by another with more conventional views or better connections. Hence, bona fide dismissals based on financial exigency

do not threaten the values protected by tenure.*

b. Diversity. The University is committed to diversity within the faculty in order to enrich its students' educational experiences, provide varying role models, and expand the thoughts, approaches and scholarship of the faculty members themselves. To the extent possible, the faculty members who are retained in a program should contribute, as a group, to the institution's interest in diversity. The remaining faculty members should be from a variety of academic and geographic backgrounds, should reflect a reasonable balance in tenure status, academic rank and length of service, and should provide racial, ethnic and gender diversity in keeping with the University's commitment to affirmative action.

IV. Rights of Faculty Identified for Removal

A. Nontenured faculty

1. Notice of nonrenewal. Whenever possible, nontenured faculty members whose appointments will not be renewed shall be given notice of nonrenewal in accordance with the schedule provided in Section 2.033 of the University Faculty Handbook. If the nonrenewal decision has not been made until after the appropriate date by which notice should be given, the appointment shall be renewed for a partial term or severance salary shall be awarded to the extent of the lateness of the notice.

2. Review of nonrenewal decisions. The faculty member may request reconsideration of the nonrenewal decision, in accordance with Section 2.051(7) of the University Faculty Handbook. An appropriate faculty committee shall be appointed to consider such requests. The functions of the review committee shall be limited, as provided in Section 2.051(7), and these Policies and Procedures shall be considered the "relevant standards of the institution" for purposes of the review.

B. Tenured faculty

1. Notice of termination. Whenever possible, tenured faculty members whose appointments will be

*Krotkoff v. Goucher College, 585 F.2d 675, 680 (4th Cir. 1978).

terminated shall be given notice at least 12 months in advance of the effective date of termination. If the termination decision has not been made in time to permit 12 months' notice, severance salary shall be awarded to the extent of the lateness of the notice.

2. Efforts to place in other suitable positions. The University will make every reasonable effort to place affected tenured faculty members in other suitable positions within the institution. Ordinarily, such efforts will be limited to offering the tenured faculty member a position in a School or College which has not itself been required to make faculty reductions. In no event shall such efforts require the placement of a faculty member in a position for which he or she is not qualified.

3. Review of termination decision. The faculty member may request review of the termination decision, in accordance with Section 2.052(3) of the University Faculty Handbook. An appropriate faculty committee shall be appointed to consider such requests and to make recommendations to the President, whose decision may be appealed to the Board of Trustees. The issues which may be considered in such a review include:

- a. the existence of a bona fide financial exigency;
- b. the validity of the program judgments and criteria for identifying faculty for removal; and
- c. whether the criteria are being properly applied in the individual case.

4. Replacement rights. No tenured appointment terminated because of financial exigency or program elimination shall be filled by a replacement within a period of two years, unless the released faculty member has been offered reappointment and given a reasonable time within which to accept or decline the offer.

OTHER INSTITUTIONAL DOCUMENTS

UNIVERSITY OF WASHINGTON
SEATTLE, WASHINGTON 98105

School of Law JB-20
Condon Hall

September 24, 1981

Professor Richard Andrews
Chairman
U.W. Financial Emergency Committee
309 Miller
CAMPUS DQ-12

RE: Criteria for Policy During Time
of Financial Exigency

Dear Professor Andrews:

The purpose of this letter is to make several recommendations regarding criteria that should be used, or not used, in creating policy applicable to times of financial emergency. We must always be aware that this Committee is setting a precedent for the future as well as solving a current problem. That is a sobering thought, adding a new dimension to the Committee's task. The recommendations contained herein are based on considerations regarding the overall future of this University; i.e., on the ways in which this University might emerge from this financial crisis as a great university, and on considerations of fairness and equity to existing faculty members, recognizing the existing University structures within which we function. Thus I concern myself with the precedent being made and solving the current problem.

I
A POLICY OF DIVISIVENESS

The first and overriding consideration, I believe, is for the Financial Emergency Committee to identify policy that does not have the consequences of pitting one division or unit of the University against another. Any policy that divides the University against itself, or provides the dynamism for internal contests, suspicions, rancor, incriminations and recriminations, and divisiveness will necessarily create intra-university wounds and traumas that will linger on for many years after this financial emergency has ended. In short, any policy productive of intra-university divisiveness, hostility and fierce struggle will be severely destructive of this University, and tragic for it and for the people of the State of Washington. Such a policy would ensure that many of the faculty members who struggled, fought, clawed and won, or merely existed through such circumstances would leave this University at the first opportunity. A lingering atmosphere of hostility, suspicion and resentment is not conducive to research or brilliant teaching, and the excellent, surviving faculty members, i.e., the ones who are fully mobile, will tend to leave. Consequently, any policy productive of intra-university divisiveness will be counter-productive and self-defeating. One thing we do not need, especially now, is a self-inflicted wound. We should not lose many of our excellent faculty members after this emergency is over.

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The lingering effects of any policy productive of intra-university divisiveness would ensure the failure of future recruitment by the University of outstandingly excellent scholars--either young or those in mid-passage. The quality of these persons, not currently here, is such that they have opportunities to move to various institutions. There is no reason for us to believe that they would choose this University under such circumstances and willingly subject themselves to such an environment. There is every reason to believe excellent recruiting prospects would choose not to come into such an environment, were it to exist here. That means we will be reduced to recruiting second-rate faculty members, a thought I shudder to contemplate.

I am fearful of the damage already done to our future recruitment because of the declaration of Financial Emergency by the Board of Regents, and its consequences. Really excellent young Ph.D.'s, and other graduates, potential faculty members, even today during these times of retrenchment, quite often receive several offers of employment because of their existing excellences and because of their promise of future productive excellence. These are the kinds of persons we want to recruit. But, as between two roughly equal offers of employment, who among them will choose to come to this University where overnight, and by a single stroke of the pen, a governing Board can wipe out their security and their careers? We must remember that excellent persons who choose lifetime careers in subject areas like Classics, Languages, including English, and many other subjects that are fully represented at this University, have consciously shaped, and will shape, their lives in ways that do not equip them to move quickly from academia into the ordinary marketplace. A professor of Ugaritic or Ukranian language, and most other professors who make a University what it is, simply are not able to move from their university positions into the ordinary marketplace with the ease available to, say, a physician or engineer. The threat over them is that they would be reduced to menial jobs with careers destroyed. Recognizing this situation, few, if any, excellent young persons who are being recruited by this University in the future, will choose to come here, when their security and careers can be destroyed overnight by a mere declaration, and especially when, because of their excellence, they also have offers from other universities that have no record of making such declarations, even if power exists for them to do so.

Last year in Fall 1980, Michigan State announced that because of massive financial duress, it would have to fire 108 faculty members, but it did not institute draconian procedures like those initiated here. Last week the Chronicle of Higher Education published an article, the burden of which was to state that not 108, but only 10, or less, faculty members actually would be laid off. By finding alternatives Michigan State showed it recognizes and it cares deeply about careers by providing security for its faculty and by recognizing that although absolutely vital to a civilized society, their skills and knowledge more-often-than-not do not translate into jobs within a corporate-capitalist economy. Because of this approach, Michigan State will have

lessened the impact and maintained its credibility (based on fact not mere words) and will be in a much better position for future recruitment. I urge you, and your Committee, to investigate and consider thoroughly the alternative techniques used at Michigan State and at other Universities that have faced similar problems; e.g., Wisconsin. For example, I understand that Governor Spellman's directive is limited to requiring this University to cut its state-appropriated "budget expenditures." It does not require (nor prohibit) elimination of divisions or programs of the University as the way of cutting "budget expenditures." I further understand Governor Spellman's written directive to have been interpreted in writing by the state budget office, and this written interpretation prohibits the University from not instituting the raises that will take effect on October 1, 1981. They must take effect and they will create new relative, financial relations among faculty and administrators at this University. However, there is nothing written in Governor Spellman's directive, or in the budget office's written interpretation of it, I understand, that prohibits an across-the-board reduction of administrative and faculty salaries after the raises take effect and after the new relative financial relations are established on October 1, say on, October 8, 1981. I recommend that all reasonable alternatives should be pursued vigorously before turning to the last alternative of a reduction-of-force.

As your first priority, I recommend that you adopt policy that either does not produce divisiveness within the University or a policy that produces the absolute minimum of divisiveness. Any other course of action would be self-defeating, and should be rejected out of hand.

II TENURE

The Faculty Code section setting forth the "Procedures To Be Observed In The Event Of A Financial Emergency" (Vol. II, p. 16a) provides that after declaration of financial emergency, the "Financial Emergency Committee of the Senate shall advise the President and the Board of Deans on policies and procedures to be recommended to the Board of Regents to effect the reduction-in-force."

I assume this is the absolute last alternative. I assume your Committee will not reach the question of reduction-in-force until after it has first fully documented and made available for open inspection and review by any faculty member the fact that all other alternatives, individually or conjointly, have been considered and can contribute nothing to alleviating the financial emergency. They should not be pursued because of their ineffectiveness, severally or collectively. In this regard, I point out that this same Faculty Code provision, cited above, states that prior to any faculty reduction-in-force, there first must have been adequate efforts to reduce University "expenditure levels" through a "reduction of administrative and service programs with corresponding reduction of personnel and services." Except for the recent

removal of the Vice President for Student Affairs, which, I understand, is unrelated to this financial exigency, I, and many, many other faculty members, do not know of any reduction in administrators and administrative personnel as required by the Faculty Code. On the other hand, there are a considerable number of administrators.

In any event, the above Faculty Code provision provides for reduction-in-force as a last, not as a first, alternative. Thereafter, this section of the Faculty Code continues, stating a very important principle:

"The University shall make every effort to follow the spirit and provisions of the University Handbook . . ."

That provision refers to something directly relevant, and that something is tenure. Although industrial workers protected by a collectively-bargained labor contract have more protection than does a tenured faculty member at the University of Washington, it nevertheless is true, and beyond doubt, that tenure is one of the traditionally unique institutions at this University, informing its spirit, producing its traditions and is expressly set forth in provisions of the University Handbook, and protected by them.

The Faculty Code provision quoted-above means that when it is creating policy, the Financial Emergency Committee is bound to make "every effort" to follow the requirements of tenure, and to respect it as an institution. In other words, I am saying that the Faculty Code creates a very strong presumption in favor of tenure (the Committee must make "every effort" to preserve it) and, of course, the Faculty Code's presumption favoring tenure must be observed. If it is to be overcome, if at all, there first must be the clearest and most convincing evidence of such very great strength that there can be no reasonable doubts on the matter. Otherwise the presumption governs. To be perfectly clear on this matter, I am saying the Faculty Code means that your Committee can draw a line; i.e., advise a criterion, for reduction-in-force based on the standard of tenured faculty versus those not tenured. But, in the absence of the clearest and most convincing evidence of the very strongest sort to the contrary, the Faculty Code prohibits this Committee from advising a standard (e.g., "Merit") that would have the consequences of firing tenured faculty before firing non-tenured faculty. Moreover, tenure at this University is recognized to be in the University as a whole, and not in a particular department or program.

This policy of the Faculty Code is justified on fairness grounds--fairness to the individuals involved. Persons with tenure have been subjected to a long probationary period involving annual review, after which a comprehensive, thorough and careful review takes place. A person's character as well as his scholarly qualifications must be scrutinized. Many persons are denied tenure at this point, and those who are awarded tenure receive it only after a careful judgment is made about them that the University "can justifiably undertake to employ them for the rest of their academic careers." (Vol. II, p. 36.) That is what the University holds out; that is the "undertaking" of the University that is the expectation it explicitly and deliberately creates in a tenure recipient;

that is what is protected by the presumption found in Emergency Financial Procedures of the Faculty Code; and that is why it is a policy that is fair to the individuals as well. This University has not, in any way, informed non-tenured faculty that this University will "undertake to employ them for the rest of their academic careers." It would be unfair, in the extreme, to tenured individuals to retain non-tenured faculty while firing tenured faculty.

This Faculty Code policy is also protective of the University's future. As indicated above, future recruitment at this University has already suffered a severe blow because of the declaration of Financial Emergency by the Board of Regents. That declaration carries the unmistakable message that the Board of Regents does not value tenure highly, indeed, quite the opposite. If this FACULTY Committee now recommends any policy that denigrates tenure, the message will be clear to every person being recruited in the future by the University of Washington: neither this Faculty nor the Board of Regents really care about tenure protecting careers, and any future faculty member who believes that he or she needs career protection had better accept an offer from some other university. First-rate faculty members at other institutions and young faculty candidates will find this University far less attractive if they believe their faculty colleagues stand ready to destroy their positions and hence careers after their probationary period during an emergency, and also are unwilling to join together in common defense of each other.

On grounds of fairness; on grounds of protecting the future of this University; on grounds of minimizing intra-university divisiveness; and on the grounds of properly discharging your duties under the Faculty Code provision governing your activities, I recommend that your Committee advise policies preserving and fully respecting the institution of tenure as a prime institution of this University.

III. MERIT

The most divisiveness, rancorous, destructive, rupturing, myopic and ravaging policy your Committee could possibly recommend is one that, in any way, permits either Departmental Chairman, or Deans, or other administrators to select faculty members for discharge on the basis of their substantive "merit" or their lack of substantive "merit." If "merit" decisions must be made, then there is one, and only one, body adequate to make that judgment. It is the group of academic peers of that faculty member, and in such event, even they should be restricted when making that judgment within explicitly fair procedures designed to eliminate bias.

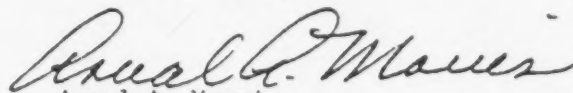
There is nothing inherent in serving as an administrator that in any way equips or enables any administrator to judge the substantive dimensions of a faculty member's discipline or the substantive understanding and/or contributions of any particular faculty member. It is the height of ridiculousness, for example, to believe that the Dean of the College of Arts and Sciences, of any Dean, has the necessary knowledge, skill, experience and other qualifications, simply because he is the Dean, to judge accurately the substantive merits of every professor and every professor's discipline existing within

Professor Richard Andrews
September 24, 1981
Page 6

the College of Arts and Sciences, or any other School or College. This lack of competence is also true of Departmental Chairpersons, and all other administrators as well. Moreover, it is notorious that persons who serve as administrators are busy and are so beset with administrative duties and activities that they no longer can even keep up in their own substantive academic fields. If decisions of substantive "merit" are to be made about a faculty member, they must be made as they are now; i.e., by that faculty member's peers, persons active in the field, and then only within explicit procedures carefully eliminating as much bias as is humanly possible to eliminate.

I recommend the above to you and your Committee for guidance during this dark hour.

Yours faithfully,



Arval A. Morris
Professor of Law

AAM/mb

cc: Members of Financial Emergency Committee
Members of Faculty Council on Faculty Affairs

UNIVERSITY OF WASHINGTON
SEATTLE, WASHINGTON 98195

May 11, 1982

Dr. William P. Gerberding
President

Associate Professor Richard Andrews
Chair, Faculty Senate

RE: REPORT OF THE JOINT TASK FORCE TO REVIEW THE FINANCIAL EMERGENCY

This Task Force was called into session on February 8, 1982, by joint action of President William P. Gerberding and Faculty Senate Chairman Richard L. Andrews. Its charge was to review the financial emergency of 1981 and the University's response thereto. The Task Force was specifically charged a) to conduct a preliminary assessment of the extent to which Section 25-54 and Executive Order 49 (Section 12-28V) of the University Handbook enabled the University to respond to the crisis in a timely, effective, and appropriate manner; b) to identify those issues which may require further study to ascertain if any of the present features of the rules should be revised in order to enhance the ability of the University to manage future financial emergencies; and c) to determine what provisions for addressing conditions of financial emergency have been made by other comparable institutions, incorporating a review of those provisions into its deliberations.

The members of the Task Force are: Dean James I. Doi, co-chair; Associate Professor Leonard Hudson; Associate Professor Ronald Moore; Vice President Ernest Morris; Associate Professor Daniel Neuman, co-chair; and Assistant Provost Steven Olswang. The Task Force met as a whole twelve times during February-May 1982, in sessions chaired alternately by the co-chairmen, and additionally met in subgroups. In two sessions the Task Force received comments from President Gerberding and Chairman Andrews.

In the conduct of its review, the Task Force examined numerous documents generated during the 1981 Emergency. The Task Force also examined letters and statements of the University of Washington Chapter of the American Association of University Professors. In addition, the Task Force solicited and reviewed relevant statements, documents, and campus rules from various other universities, including Washington State University, Western Washington University, Michigan State University, Ohio State University, Rutgers University, and the Universities of Minnesota, Michigan, Wisconsin, Illinois, Oregon, and California.

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The Task Force proceeded from the perspective that valuable knowledge could be gained from an examination of the 1981 financial emergency which should be committed to institutional memory. The Task Force's principal finding is that the financial emergency processes, though extremely painful in actual application, generally worked well and that all segments of the University community are to be commended for their efforts and cooperation. The Task Force generally believes that the Declaration was an appropriate response to the conditions that prevailed at the time of its declaration.

One factor that contributed heavily to the Task Force's conclusion was the University's relative lack of fiscal autonomy. The University of Washington stands virtually alone among the nation's major graduate-research universities in the degree to which its budget is controlled by the state legislature and the Governor. This condition greatly reduces the institution's capacity to respond to financial crises without declaring a financial emergency.

While we have found that the procedure published in the University Handbook worked well on the whole, we also found that improvements, particularly in the rules prescribing the process and roles of the many participating constituencies, could be made. This Report contains our considerations and recommendations as to how the rules might be modified to improve the process. We hope, of course, that the University will not be faced with another financial emergency.

Part I. Declaration of Financial Emergency

The present provisions of the Handbook indicate that a financial emergency may be declared only in extreme financial circumstances and when other existing rules governing reductions would not be sufficient to meet the situation. The potential consequences of such a declaration are drastic and painful for the University. Principally, the declaration permits the elimination of faculty with tenure, and non-tenured faculty during the term of their appointment, on short notice and with limited appeal rights. The gravity of these consequences dictates that the process leading to a recommendation to the Board of Regents that a financial emergency be declared must be cautious, fair, well-informed, and as responsive as possible to the interests of the various segments of the University community. While this process must be careful, it cannot be prolonged. A declaration of financial emergency should not be considered unless budgetary problems are so great as to require immediate deliberation and response. It is imperative, therefore, that the review process preceding a declaration not be so cumbersome as to diminish the institution's ability to address the crisis in a timely manner.

The Task Force is unable to find any useful purpose served by having two distinct (and widely separated) Handbook provisions controlling the financial emergency process. In addition, the existence of two Handbook provisions enhances the opportunity for conflicting interpretation. We therefore recommend

that Section 25-54 and Executive Order 49 (Section 12-28V) be combined into a single statement. Our recommendations on several minor and uncontroversial revisions are noted below.* Our recommendations on the revision of major components of the existing provisions are presented under three headings of this Part I: (A) The Process Leading to a Declaration of Financial Emergency; (B) The Roles of Various Parties During a Financial Emergency; and (C) The Process of Terminating a Financial Emergency.

A. The Process Leading to a Declaration of Financial Emergency

The Task Force recommends that the following principles be incorporated into the redrafting of a single Handbook provision governing the declaration of a Financial Emergency:

- 1) The responsibility for initiating the proposal for the declaration of a financial emergency should continue to reside with the President of the University.
- 2) Whether budgetary conditions warrant a recommendation to declare a financial emergency is a judgment to be made by the President (as is currently stipulated in Section 25-54). The current language in Executive Order 49, paragraph 3, which describes this presidential judgment should be modified, however. The provision should stipulate that the President must be satisfied that procedures prescribed in Sections 25-52 and 25-55 (Program Reorganization) and all other University cost reduction procedures, when used in conjunction with Program Reorganizations, would not be adequate to meet the mandated reductions within the time required. The current language calls for a judgment that such procedures "are exhausted." This places an unreasonable, if not impossible, burden on the President. It is expected, however, that the President will inform the Financial Emergency Committee of the reduction procedures considered and the basis for the judgment that the existing reduction procedures would not be adequate.
- 3) We believe that the size of the Financial Emergency Committee must be small enough to allow responsive action. We believe, moreover, that since the members of the Senate Executive Committee are elected by faculty Senators, who are in turn elected by the faculty at large, that they should continue to represent the faculty on this committee. Similarly, the particular and special knowledge of the members of the Faculty Senate Special Budget Committee makes them especially qualified to serve on this committee. However, the Task Force believes the membership of the Financial Emergency Committee should be expanded after the formal declaration of an emergency is made by the Board of Regents, and have made recommendations regarding the expanded committee membership elsewhere in this Report.

* Paragraph 4 of Executive Order 49 (which neither instructs nor enforces) should be deleted. Non-sexist language should be inserted in place of the several male only references in Section 25-54.

4) Some question has been raised about the appropriateness of the Chair of the Faculty Senate serving both in that capacity and as Chair of the Financial Emergency Committee. It is our judgment that as the chief faculty representative elected by the Faculty Senate, which is representative of the faculty at large, the Faculty Senate Chair is the most appropriate person to chair the Financial Emergency Committee.

5) The present provisions allow the President, as a voting member of the Senate Executive Committee, to be a voting member of the Financial Emergency Committee. President Gerberding, at the outset of the Financial Emergency Committee's deliberations, informed the Committee that he would not exercise his voting rights. The Task Force believes this to have been an appropriate action by the President, since it was his recommendation the Committee was reviewing and since the Committee's recommendation was to be delivered back to the President. Since this would be true in future emergencies as well, the Task Force recommends that the President continue to be a member of the Financial Emergency Committee, but without voting rights.

6) Prior to making its decision on whether or not to concur in the President's decision to recommend to the Board that a financial emergency be declared, the Financial Emergency Committee should consult with as many members of the faculty as is feasible. It is expected that this normally would be done through Group Representatives consulting with other Faculty Senators in their respective groups, and these Senators, in turn, consulting with their constituents.

7) After the Financial Emergency Committee decides whether to concur, or not to concur, in the President's recommendation, the Financial Emergency Committee should immediately report its decision and the rationale therefor to the faculty, either at a regular or emergency session of the Faculty Senate. The Task Force considered the question of whether the Senate should be called upon to ratify the Financial Emergency Committee's decision. It is our judgment that the need for timely action on the declaration issue makes recourse to a ratification debate in the Faculty Senate impractical, and that faculty opinion is well represented by the nature of the composition of the Financial Emergency Committee.

B. The Roles of Various Parties During a Financial Emergency

1) Once a financial emergency has been declared, it is vitally important that all parties to the process be in close and regular consultative contact with each other. Therefore, the Financial Emergency Committee should report frequently to the Faculty Senate during the preparation of emergency guidelines.

2) The Task Force notes that some concern was expressed about the role of the non-voting members of the Senate Executive Committee (chairs of selected standing councils) in the Financial Emergency Committee's deliberations. The Task Force believes that the council chairs who are non-voting members of the Senate Executive Committee should become non-voting members of the Financial Emergency Committee after the formal declaration of emergency is made by the Board of Regents. Their presence will enhance the Financial Emergency Committee's expertise as it develops emergency guidelines.

In addition, the Task Force recognizes that some concern was expressed about the function of the other members of the Senate vis-a-vis the Financial Emergency Committee. We believe the Faculty Senate should have the option to elect from among its membership two additional voting members -- Senators-at-large -- to the Financial Emergency Committee once a financial emergency has been declared. Such supplementation of the Committee would underscore its representative character, and would not adversely affect its ability to carry out its work expeditiously.

3) The present wording of one Handbook provision (Executive Order 49, paragraph 1.a.) suggests that the President and the Board of Deans are responsible equally to receive and review the advice of the Financial Emergency Committee and to recommend to the Board of Regents the action to be taken on the policies and procedures formulated by the Financial Emergency Committee. In practice, however, the Board of Deans advises the President on these matters, and, taking into account that advice, the President makes a recommendation to the Board of Regents. This relationship is consistent with the way in which the Board of Deans and the President interact in other circumstances and should, therefore, be stated explicitly. The revisions to the Financial Emergency rules should reflect more accurately the advisory role of the Board of Deans to the President.

4) During the 1981 Financial Emergency, concern was expressed that alternatives to a reduction in force were not being considered adequately. Consequently, the Task Force discussed the manner in which alternatives to faculty reductions could be explored concurrent with the development of policies and procedures for a general reduction in faculty. The Task Force believes possible alternatives should be examined thoroughly and carefully, both by the Financial Emergency Committee and appropriate administrators. In view of the time constraints and other demands on the Emergency Committee, however, it may wish to delegate the task of preliminarily identifying and evaluating possible alternatives to an ad hoc group of faculty and administrators. The Handbook provisions should state that it is a role of the Financial Emergency Committee to consider alternatives to reductions in faculty concurrently with its formulation of recommended policies and procedures for a general reduction in faculty.

5) All segments of the campus community are affected by a state of emergency and should, to the degree possible, be kept informed of the status of pertinent developments. Accordingly, the President and the Financial Emergency Committee should employ a variety of methods to ensure that the faculty and others understand the financial problems confronting the University and the measures being instituted and contemplated to address them. The revised Handbook provision should state that it is the obligation of both the Financial Emergency Committee and the President to ensure that timely and pertinent information is provided to faculty and other members of the campus community over the course of an emergency.

C. The Process of Terminating a Financial Emergency

The present rules make no reference to the termination of a financial emergency. In the 1981 emergency, the President, with the concurrence of the Financial Emergency Committee, recommended to the Board of Regents that the emergency be terminated when he concluded that the necessary reductions could be managed without effecting a reduction of faculty during the term of their appointments. The Task Force believes that this was the proper method and basis upon which to terminate the Emergency.

To make this process more widely understood, the Task Force recommends that a statement regarding the termination of an emergency should be inserted in the revised Handbook provision. It should state that both the President and the Financial Emergency Committee have the responsibility to consult closely with one another in monitoring the University's financial situation. If either believes that the reductions can be accomplished without implementation of a mandatory reduction in faculty, that assessment should be communicated, through the President, to the Board of Regents for its consideration.

Section II. Policies and Procedures

One of the principal questions that the Task Force was asked to address was whether actual policies and procedures for a reduction in faculty in the event of a financial emergency should be formally codified in the Handbook of the University of Washington. The Task Force examined this question from three standpoints: 1) What are the relative merits of incorporating such provisions into the Handbook and of leaving them for development at the time of an emergency? 2) Was the process as followed under the existing Handbook provision in the 1981 Emergency more detrimental to the University than if rules had existed? 3) Do other institutions have such rules incorporated into their institutional handbooks?

The present Handbook provisions are based on the conviction that any rules and regulations which must be developed in an emergency situation should be developed by those involved, should address the needs of that particular emergency, and should terminate at the conclusion of the emergency. This

approach provides the institution the ability to respond, in the most flexible manner possible, to the particulars of a given crisis. Since each crisis is likely to differ from the next, each should be treated accordingly. As long as the safeguard is present that the initial development of the procedures is to be undertaken by the appropriate faculty body, there is no reason to bind the University to a single policy which may be inappropriate or unworkable in future emergencies.

The contrasting view is that regardless of the emergency, faculty members are entitled to know the specific rules that will affect their appointments at the University. Incorporating into the Handbook specific rules for reduction in faculty binds the University, in a contractual manner, giving faculty definitive answers to their status in such situations.

The Task Force, while acknowledging the merits of both positions, unanimously endorses the first view. It is unreasonable to bind a future generation with rules promulgated by a predecessor based on an experience that may bear little resemblance to a future crisis. We concur in the wisdom of the drafters of the present Handbook provisions that each emergency should be treated anew, and that rules should be formulated by those involved in responding to a particular emergency.

The Task Force also considered the effect on the University of developing, during the emergency, rules for reduction in faculty. There is no doubt that the process of developing the rules for reduction in faculty caused severe consternation amongst some faculty, and may have lowered morale unnecessarily. Unfortunately, discussion of termination processes must inevitably have this effect.

On the other hand, the level of involvement of the faculty community was commendable. Indeed, the emergency process fostered discussion of each aspect of the procedures. While not all faculty agreed with the final product, it must be observed that a significant number of faculty members had an opportunity to be involved. This would not have been possible if the rules were previously written into the Handbook.

Moreover, the development of the rules took time. Some would view this as detrimental, but the Task Force views it as a positive feature of the process. Among other things, it provided time to reflect on the issues, it provided time to explore other alternatives to a reduction in faculty, and it provided time for the budgetary matters to be addressed in other forums. On balance, the Task Force is not persuaded that the problems associated with developing the procedures during the emergency justify the codification of the rules into the Handbook.

Thirdly, the Task Force reviewed the status of such procedures at other institutions, both in the state and elsewhere. Washington State University, Western Washington University, and the Community Colleges in the State of Washington all have prescribed rules regarding reductions in faculty in the event of a financial

emergency. Washington State University and the Community Colleges currently remain in a state of financial emergency.

Of the other comparable institutions to whom we addressed inquiries, the University of Wisconsin and the University of Oregon have policies in place. The Ohio State University is in the process of developing rules related to faculty reduction in the event of financial emergency. Michigan State University implemented a reduction in faculty when it declared a financial emergency on February 6, 1981, but adopted no formal procedural rules. The Universities of Michigan, Illinois, California, and Minnesota do not have existing rules governing faculty reductions in the event of financial emergency. We find none of the emergency provisions we have reviewed to be preferable to our own.

While some major state research universities have standing rules governing faculty reductions in the event of financial emergency, many do not. Therefore, the position of the University of Washington would be consistent with that of comparable institutions if it did not adopt and codify rules for faculty reductions in the event of financial emergency, but instead continued its present practice of developing such policies and procedures for each emergency anew.

The Task Force recommends that the present practice of developing policies and procedures for reductions in faculty in the event of a financial emergency at the time of each emergency be continued.

The Task Force is critically aware that much effort and expertise went into the development of the policies and procedures document for the 1981 Emergency, and recognizes that some benefits from this process should be retained. The groups which developed the policies, in the opinion of the Task Force, addressed almost all eventualities. It is this breadth of coverage that the Task Force believes should be preserved. Thus, the Task Force recommends that a list of topics to be addressed by the groups developing the policies and procedures be included in the Handbook provision. For example, the provision could read something like the following:

In developing policies and procedures for the reduction in faculty, the following matters shall be addressed:

1. Criteria and Procedures for Program Reduction
2. Criteria and Procedures for Program Termination
3. Programmatic Appeal Procedures
4. Procedural Protections for Faculty Identified for Removal

While it is clear that such policies and procedures must be developed once a financial emergency is declared, alternatives to the implementation of a mandatory reduction in faculty must be considered by the Financial Emergency Committee and the administration. Such alternatives should be examined while the faculty reduction policies and procedures are being developed.

The Task Force also recommends retaining appropriate language in the revised provisions, similar to that already in existence, which specifies that tenure must be protected to the extent feasible in any rules for reduction in faculty which are to be developed. It is on tenure that the research university finds true distinction between itself and other agencies of our society, save possibly the federal judiciary. Tenure is the foundation stone of academic freedom, without which inquiry cannot exist for very long. Unlike tenure in civil service or seniority rights in public school employment, merely satisfactory performance or length of service is not the criterion for academic tenure. Academic tenure calls for exceptional scholarly performance and the promise of continued significant contributions to the knowledge capital of humankind.

Accordingly, the Task Force believes that the importance of tenure to the University should be recognized by stating that the University would not remove a tenured faculty member as a result of a financial emergency with less than one year's notice. Certainly, to give less notice would be one of the most extraordinary actions that could be taken. Nonetheless, because the Task Force has concluded that the rules for mandatory reduction in faculty in the event of a financial emergency are to be developed anew for each emergency, the institution's ability to provide less than one year's notice must not be removed through the codification of such a requirement.

The members of the Task Force are not in agreement as to whether the rules adopted in the Policies and Procedures for Mandatory Reduction in Faculty in the 1981 Emergency adequately recognized the status tenure should have received. Specifically, the Task Force members have differing views on whether the merit clause should have been incorporated into the document. However, since the Task Force has concluded that such matters are to be decided in the context of each emergency, no unified position need be reached on this matter.

The Task Force also recommends that a statement on affirmative action, similar to that in the existing Handbook provisions, be incorporated into the revised rules. We are unanimous in our belief that should a reduction of faculty ever be required in an emergency situation, that consideration of the racial, sexual, and ethnic characteristics of the faculty of this institution is required if the University is to continue its efforts to achieve equality in education.

Part III. Definition of an Academic Program

In addition to the study of the 1981 financial emergency, the President also referred to the Task Force the question of whether a definition of "academic*program" should be incorporated into the Handbook, and, if so, what the wording of the definition might be. The question comes to the Task Force as a result of apparent differences of opinion between and within the Senate, its Councils, the Deans, and the President, as to the elements to be contained in the definition. A brief review of the legislative and administrative history is relevant to our response to the questions.

* While simply the word "program" previously has been used, it is important to note that this term focuses on "academic programs." Therefore, the Task Force uses this term throughout its discussion.

The first definition of an academic program was found in the "Criteria for Resource Re-Allocation for Academic Programs at the University of Washington" which was approved by the Faculty Senate on 24 January 1981. This definition was promulgated to guide the evaluation of segments of the University, e.g., specialized instructional and research areas. It was used as the foundation to guide faculty and administration in carrying out internal reviews of their areas. That definition was as follows:

A program is an area of specialization which has one or more of the following characteristics:

- a) has "program" as part of its title;
- b) grants a degree or a credential;
- c) has a sequence of courses with a common prefix;
- d) has been identified as a program by a distinct faculty action.

Ordinarily, a program shall be smaller than an administrative unit such as a department and larger than the activities of a single faculty member.

That same definition was included by the Provost in his "Procedural Guidelines for Program Eliminations," which were developed and distributed for the purpose of ensuring that consistent processes were followed in proposed program terminations originated by the Deans pursuant to Handbook, Sections 25-52 and 25-55. These Guidelines, including the definition of an academic program, were endorsed by the Faculty Council on Faculty Affairs as being consistent with the Handbook rules on program terminations, though the Council anticipated revising the Handbook rules in the near future. Those Guidelines remain in effect at this time.

That same definition also was incorporated into the "Policies and Procedures for a Mandatory Reduction in Faculty on Declaration of a Financial Emergency," which was adopted by the Board of Regents on November 3, 1981. This definition - though not other parts of that document - was recommended to the Regents by the Financial Emergency Committee, composed of the voting members of the Senate Executive Committee and the Special Senate Budget Committee.

The same definition of an academic program has been adopted, at various times by the Senate, the Senate Executive Committee, the Faculty Council on Faculty Affairs, the Financial Emergency Committee, the administration, and the Board of Regents. It is the only definition of an academic program now in effect at the University. The only other definition to come forward resulted from the

Senate action on January 28, 1982. After receiving the recommendation of the Faculty Council on Faculty Affairs and the Senate Executive Committee that the President adopt the aforementioned definition of an academic program as part of an unnumbered Executive Order, codified as Section 23-23 of the Handbook, the Senate, as a body, amended that definition to delete identifier "c) has a sequence of courses with a common prefix." This identifier was deleted after Senators from departments which have not used prefixes to identify programs indicated that they did not want their course prefixing structure to be viewed as identifying programs.

The Task Force concurs in the underlying basis for the Senate resolution that a formal definition of an academic program should be incorporated into the Handbook. The Handbook, in Sections 25-52 and 25-55, provides a process for academic program reorganization and for the removal of faculty as a result of academic program reorganization. Yet there is not an "official" definition of an academic program. The essence of the Senate's desire for an official definition is to fill this void, and The Task Force recommends that a definition of an "academic program" be formally adopted by the President.

The Task Force further recommends that the definition to be adopted read as follows:

An academic program is an area of specialization which has one or more of the following characteristics:

- a) has program as part of its title;
- b) grants a degree or a credential;
- c) has a sequence of courses with a common prefix;
- d) has been identified as a program by a distinct faculty action.

Ordinarily, an academic program shall be smaller than an administrative unit such as a department and larger than the activities of a single faculty member.

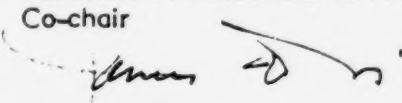
In making this recommendation, the Task Force is mindful of the fact that some departments have used prefixes in ways which do not represent programmatic sequences. These departments should, therefore, be given the opportunity to review their prefixes to make them consistent with the usage which denotes a program track or programmatic course sequence. Thus, the Task Force recommends that the President announce a) his intention to adopt the aforementioned definition of an academic program and b) provide adequate time for departments whose prefixes do not reflect academic program distinctions to

Dr. Gerberding, Professor Andrews
May 11, 1982
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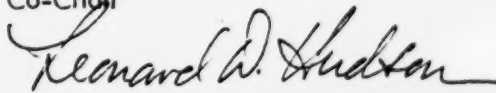
change those prefixes. The Task Force believes that adopting the definition effective September 16, 1982, would provide departments adequate time to review their usage of course prefixes.

Respectfully submitted,

Associate Professor Daniel Neuman
Co-chair

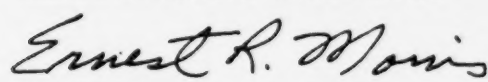


Dean James Doi
Co-Chair



Associate Professor Leonard Hudson

Associate Professor Ronald Moore



Vice President Ernest Morris

Assistant Provost Steven Olswang

WASHINGTON UNIVERSITY SCHOOL OF DENTAL MEDICINE

CONFIDENTIAL

MEMORANDUM - October 1, 1991

TO: University Administrator

FROM: Peter H. Ruger
General Counsel
Campus Box 1058

SUBJECT: Legal Issues in School Closing

We recently met to review potential legal issues associated with the possible closing of a School of the University. Issues arise in five categories. They are briefly discussed below, but not in order of importance.

1. Patient Care: The clinic sees many patients. We have an obligation to exercise a reasonable effort to find other health care providers for our patients. We are not required to provide care ourselves in perpetuity.
2. Contracts: Contracts and grants may be in effect with outside business and governmental entities. These agreements need to be identified and reviewed to determine whether they can be terminated or completed elsewhere in the University. If they can't be completed, we need to try to negotiate the best possible termination of our responsibilities.

It is possible that litigation asserting a breach of contract could occur. If such a development appears likely, reserves should be established for the potential liability as well as associated litigation costs.

3. Gifts and Endowments: The documents creating the endowment of the School should be examined to determine whether the funds can be transferred to other University purposes without judicial intervention. If donors are alive, consent might be sought for such a transfer. In some cases, it will probably be necessary to obtain a court order to transfer funds to another part of the University. It is unlikely that the funds will be transferred to another institution, or returned to the donor. The terms of known expected gifts should be reviewed and changed, if necessary.

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4. Personnel:

- a. Non-academic: So long as decisions are made in a non-discriminatory manner, the termination or transfer of non-academic staff should not have significant legal consequences.
- b. Notice of termination should be given in accordance with University policies and procedures. One year's advance notice would be all that would be required for faculty in this category. Indeed, there would be individuals in this category who would not need this much notice but such a notice period would provide ample legal, as well as public relations, protection. Hopefully, notice could be given prior to the beginning of an academic year and conclude with the end of that year.

(2) Tenure track:

- a) Non-tenured faculty: The provision of Section IV.B.4 of the tenure document govern the extent of notice needed. Financial exigency need not be demonstrated to terminate such individuals.
- b) Tenured faculty: Section VI.A.2.C. of the tenure document governs termination of tenured faculty due to the "...discontinuance of academic programs because of financial exigency..." This section is complex and convoluted, and will be difficult to apply. It is attached.

The tenure document imposes an obligation upon us to exert "every effort" to find "acceptable positions" within the University for tenured faculty. If we wish to terminate tenured faculty, our claim of financial exigency "must be demonstrably bona fide."

"Financial exigency" is defined, in part, as threatening to cause "a substantial drain on the resources of the University." If termination of tenured faculty is anticipated, the proposed closure decision must be discussed with the Senate Council. While the reserve system may preclude any limitation by the following provision, its presence will probably provoke internal debate: "Financial exigency, shall for a reasonable period of time preclude substantial expansion of academic programs elsewhere in the University, except in

extraordinary circumstances (e.g. expansion financed by resources which could not have been used to retain the released faculty members)."

If a tenured faculty member is terminated, he or she may challenge the decision, and several related aspects, and have a hearing before the Academic Freedom and Tenure Hearing Committee. That committee's decision (and this is good news) may be appealed by either the University or the faculty members to the Board of Trustees.

Obviously, the possible elimination of tenured faculty represents the most significant legal problem associated with closure or program reduction. However, the complexity and ambiguity of this process should not prevent us from making the necessary decisions. Although there will be considerable media and internal debate over the termination of tenured faculty, I predict that there will be only a few cases litigated, and that the ultimate resolution of the controverted issues will be in our favor.

I suspect that many tenured faculty members would accept generous severance or retirement options. Outplacement assistance and other benefits would further the transition process. Some faculty could be employed elsewhere in the University in faculty or administrative roles. If School assets were used for salary support, such transfers might occur more readily. In structuring many of the arrangements, assistance from this office will be needed.

5. Students: Courts have uniformly held that a student has no right to the continuation of a particular program. Although a suit might be filed, it would be unsuccessful. Early notice of the decision and assistance in finding other schools, and reimbursement of expenses in moving to them, would substantially reduce the possibility of any claims.
6. Reserve for Anticipated Litigation: Undoubtably, the John Doe litigation will continue, regardless of the status of the School. Other claims, particularly involving dental malpractice, may arise. We should establish a reserve fund from the School's funds to meet these potential costs, including legal expenses associated with them.

October 1, 1991

Page 4

7. Fiscal Note: You asked me to estimate the impact of the proposed decision on my office. If you wish, I can assign time values to each of the segments but the bottom line, assuming that one or two faculty contest their termination, is that I predict that a closure decision will produce a legal workload equivalent to that expended by one lawyer in one year. However, this effort will probably be spread over a two or three year period. If this is handled outside, the cost will be between \$150,000 and \$200,000. If handled internally, an additional person will be needed to do some basic work and, more significantly, to free me from the avalanche of "ordinary" legal business so that I can devote adequate time to the important issues connected with the closure. I anticipate salary costs for another lawyer would be \$45,000 to \$50,000 per year. Other options, such as part-time help, could be explored also.

Please do not hesitate to contact me if I can be of further assistance.

PHR:kir

Office of the Chancellor

June 2, 1989

MEMORANDUM

To: Washington University Alumni

From: William H. Danforth 49

It is with great regret that I write you about Washington University's decision to close the School of Dental Medicine. I believe you should be aware of the circumstances and the process which led to this difficult decision about the future of the School.

Because of nationwide trends that already have had a disturbing negative impact on the stability of dental education in the private sector, three months ago I established a committee to evaluate the current situation faced by the School of Dental Medicine and to outline options available to us. Comprising the committee were Ronald G. Evens, Vice Chancellor for Financial Affairs (chairman), Lee K. Benham, Professor of Economics, David A. Bensinger, Dean of the School of Dental Medicine, and Armand C. Stalnaker, Professor of Management.

The committee reviewed extensive materials about the School, including numbers of student applicants to American dental schools and to Washington University, the loss of current students through transfers to other schools, the financial condition including current and projected operating deficits, research support, and the role of the dental clinic in providing patient care to the St. Louis region. The committee also consulted with the deans of dental schools at Harvard, the University of Iowa, and Baylor.

The committee's extensive report, a synopsis of which is enclosed for your information, outlines a chronically difficult situation for Washington University's dental school, and for all dental schools, especially those not receiving significant state support. The situation posed difficult challenges and few choices. The report suggested alternatives, ranging from restructuring to closure. Each option would have had serious impacts on the students, the faculty and staff, the University, and the community. To continue the current program or to change the focus to postgraduate education and research would have required finding significant new sources of funding for the School. Finding such new support seemed unrealistic.

A possible source of support at the levels needed either to bring the School's expenditure per student up to parity with most state-supported schools, or to transform the School into a center for postgraduate education and research, is state government. However, our discussions with state officials indicated

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such new support would not be forthcoming. Indeed, a clause in Missouri's constitution might well have barred any direct subsidy. Thus, closing the School became the inevitable decision.

The situation was that despite one of the highest tuitions in the nation the expenditures per student at our School of Dental Medicine were only about one-half that of the average spent by state institutions. The wonder has been that the faculty and the staff have been able to do a superior job with so little funds. The question faced by the administration and the Board of Trustees was whether it is still possible to mount a strong program in dental education without significant inflow of public funds. The enclosed documents spell out in greater detail some of the problems.

The decision was difficult and painful. To delay this painful but necessary decision would only have allowed a respected School's quality and reputation to suffer a rapid decline.

Enclosures

UPDATED ABSTRACT: EVALUATION COMMITTEE REPORT
WASHINGTON UNIVERSITY SCHOOL OF DENTAL MEDICINE

On February 14, 1989, Chancellor William H. Danforth established a committee "to evaluate the direction of the School of Dental Medicine (SDM) in light of national changes in dental education." The committee was asked to examine SDM's strengths and weaknesses and outline possible options for future direction. Members of the committee included Ronald G. Evens, Vice Chancellor for Financial Affairs (chairman), Lee K. Benham, Professor of Economics, David A. Bensinger, Dean of the School of Dental Medicine, and Armand C. Stalnaker, Professor of Management. The committee met seven times to review extensive materials about SDM and dental education in the nation. Three consultants assisted the committee, which also interviewed key faculty and toured the dental school facilities. The consultants are: Paul Goldhaber, Dean of the School of Dentistry at Harvard University, James McLeran, Dean of College of Dentistry at the University of Iowa, and Richard Bradley, President and Dean of Baylor College of Dentistry.

Dental Education Trends in the Nation -- The committee's investigation revealed the following information common to many schools of dental medicine throughout the nation:

- o Student interest in dentistry as a career has seen the applicant pool decline from 15,000 in 1975 to 4,000 in 1989.
- o Openings for students have not fallen as rapidly, so that the ratio of new students to openings is now 1.3 to 1, as compared to 2.7 to 1 in 1975.
- o As federal subsidies fall, dental schools are more dependent upon tuition, which is increasing at twice the national rate for undergraduate tuition.
- o Financial difficulties are reducing the number of dental schools, as indicated by the recent closure of programs at Emory, Georgetown and Fairleigh Dickinson, as well as the continued limitation of funding for dental research. Successful funding increasingly requires that a major part of the budget of any dental school derive from state funds, university subsidy or endowment income. Of the 56 United States schools, 46 have state support. An increasing number of dental schools are associated with state universities, and few dental schools have significant endowments.

Analysis of the School's Strengths and Weaknesses -- The report cites the strengths of the Washington University School of Dental Medicine, including an experienced, loyal, highly competent clinical faculty and administrative staff, the provision of dental services to a substantial population, strong specialty programs (e.g. orthodontics), several outstanding investigators, a reasonably sized clinical facility, satisfactory equipment, and limited but effectively equipped and occupied research space.

Concerns for the Washington University School of Dental Medicine are both financial and academic -- against a backdrop of declining national need and limited extramural funding potential. The school has had financial difficulties in the past and has been operating under a constrained budget for a number of years, but the forecast for 1989-90 and beyond indicates that the problem is now acute and severe. These include:

- o Loss of an estimated \$240,000 for 1988-89 and \$450,000 for 1989-90, whereas small excesses of income over expenses were generated in the two previous fiscal years. The major reason for the 1988-89 loss was an unanticipated defection of students and the consequent loss of tuition income, which accounts for about two-thirds of the school's revenue.
- o Research grants have declined from \$926,000 in 1986 to \$715,000 in 1989, while the annual budget has remained relatively the same since the early 1980s at approximately \$6 million per year.

- o The decline in the number of enrolled students has been more rapid at Washington University than the national average.
- o Prospective students' (candidates who are not yet enrolled) scores on the Dental Admissions Test have declined from 4.03 in 1984 to 3.25 currently, as compared to a national average of 4.49 in 1984 and 4.27 in 1988-89.
- o Withdrawals of currently enrolled students totaled twelve last year, putting further financial pressure on the program.
- o Attracting students is extremely difficult because very little financial aid is available to prospects, making it difficult for Washington to compete with dental schools that have better financial aid packages.
- o Washington University dental tuition has reached nearly \$19,000 annually and is one of the highest in the nation.
- o The School has one of the lowest expenditures per dental student in the nation and one of the highest student-to-faculty ratios in the nation (6.2 to 1).

Faculty and Staff Resources -- The School of Dental Medicine currently has approximately 105 second, third and fourth-year students. There are 37 full-time faculty members, 17 of whom are tenured. There are also 123 part-time faculty. Full-time administrative and clerical staff total 86. Through the dental clinic, in which students receive practical experience and training from faculty, there were 47,000 patient visits in 1988 and 5,700 new patients. Thirty percent of the patients are from St. Louis city with the balance coming from surrounding communities. Clinical faculty also help support pedodontics at Children's Hospital and collaborate in programs at the Washington University School of Medicine in plastic surgery and otolaryngology. Research faculty collaborate with several medical school departments.

Options for the Future -- The committee considered various options and identified four that warranted further study:

- (1) **No Change** -- This is not a practical option, because the school's financial situation will continue to drive tuition higher and result in further declines in enrollment.
- (2) **Increase Outside Financial Support** -- It is estimated that new outside funding would have to exceed \$6 million per year (SDM's annual expenditure per student is currently \$25,000, compared to \$49,000 at state-supported schools).
- (3) **Switch to a Post-graduate School Model** -- By reducing current class sizes from 46 to about 35 and building new strengths in post-graduate (specialty and subspecialty) education and in research, the School could fill a societal need, continue its educational and research programs, and provide continued dental care for area citizens. New faculty would need to be recruited. This option is expected to require a minimum of \$15 million in new endowment and \$5 million in transition costs.
- (4) **Close the School of Dental Medicine** -- This option has costs and involves reduction of patient care services to the community, loss of educational opportunities, and also the potential loss of research faculty. Costs for closure, including transfer and/or discharge of faculty, staff and students would range between \$3 and \$6 million, depending upon: (a) length of time required, (b) policies for student transfer, (c) faculty and staff compensation issues, and (d) reuse of space and transfer of other resources.

News Release

Contact: .

Fred Volkmann
(314) 889-5261

WASHINGTON UNIVERSITY WILL CLOSE SCHOOL OF DENTAL MEDICINE

St. Louis, June 2, 1989 -- The Board of Trustees has decided to close the School of Dental Medicine according to an announcement made today by William H. Danforth, chancellor of Washington University.

The University attributes the closure to the severe economic pressures faced by private dental schools across the nation. Several other schools affiliated with private universities have been closed or are in the process of closing, primarily because they cannot exist without subsidy from state governments in a time of declining enrollments, escalating costs, and an adequate supply of practicing dentists.

"A thorough analysis of recent national trends in dental education and their effects on our own dental school has made it very clear that the program has reached a predicament that no reasonable measures can reverse," Danforth said. "Interest in dental careers has declined, as well, helping to bring about a number of recent dental school closures.

"For more than two decades, we have struggled to build a strong dental education and research program," Danforth noted. "I know that Dean Bensinger, the faculty, and the staff have worked diligently and earnestly to build a good program. I regret that circumstances affecting all dental education programs throughout the nation are more formidable than even their most herculean efforts could overcome."

The approximately 70 students currently enrolled in the third and fourth year undergraduate dental program during 1989-90 will be able to complete their degrees according to the normal schedule. Because of difficulty in maintaining a strong program for a full three years after the announcement of closure, the

- more -

Dental School
ADD ONE

approximately 35 sophomore dental students will, to the extent possible, be assisted with placement in other dental schools. Those students who have been admitted for the 1989-90 first year class will also be assisted with placement elsewhere.

The School of Dental Medicine will operate its clinic during the phase-out period although the number of visits is expected to begin to decline after May 1990. Patients unable to be seen will be referred to area dentists and clinics whenever appropriate. Washington University will continue to provide care for patients to whom it has special obligations.

The dental school has 37 full-time faculty of whom 17 are tenured. All tenured faculty will be offered the opportunity for transfer to other departments of the University. Appointments of non-tenured faculty will be reviewed on an individual basis.

The dental school has an additional 86 non-academic full-time employees. Their positions will be continued until closure, and efforts will be made to place them in other parts of the University.

Evaluation Committee Report

A dental school evaluation committee studied and reported on the losses of current students transferring elsewhere, existing and projected financial deficits, low levels of research support, and the role the dental clinic plays in providing care to patients in the St. Louis region. Chairing the committee was Ronald G. Evens, vice chancellor for financial affairs.

The report cited the strengths of the Washington University School of Dental Medicine, including experienced, loyal, highly competent clinical faculty and administrative staff, the provision of dental services to a substantial population, strong specialty programs (e.g., orthodontics), several

- more -

Dental School
ADD TWO

outstanding investigators, a reasonably sized clinical facility, satisfactory equipment, and limited but effectively equipped research space.

The evaluation committee report suggested three alternatives to the present situation -- (1) find more financial support from outside sources to improve the academic program; (2) reduce commitment to undergraduate education in favor of more focus on post-graduate education and research; or (3) close the School of Dental Medicine.

Trends in Dental Education

Principal among trends in dental education are decreases in the number of students applying to dental schools and loss of currently enrolled students to other institutions with lower tuition.

The key question faced by the Washington University administration and board was whether private universities can continue to mount quality programs of dental education. If so, how would it be done, what would be the cost and what would be the source of the funds? If not, how can the faculty, students, staff and patients be best treated with least personal disruption?

The School's primary source of income is tuition. The decreases in first year class size and the decision of some current dental students to transfer to other, less expensive state-supported dental schools have led to a loss of operating funds. This has led to significant increases in tuition -- currently, tuition is \$19,000 yearly -- one of the highest in the nation and nearly double that of many state university programs.

In addition to revenue losses from tuition, the School's \$1 million endowment has not increased substantially, and income from federal grants for research and training has declined approximately 23 percent in the last three years -- from \$926,000 in 1986 to \$715,000 in 1989. The School of Dental

- more -

Dental School
ADD THREE

Medicine's annual expenditure per student is \$25,000, compared to \$49,000 at state-supported schools. The costs of bringing that figure to a more reasonable level are high.

In fiscal year 1989, it is estimated the School will post a \$240,000 deficit on an annual budget of \$6 million. Projections for future years suggest larger losses, including a \$450,000 deficit for 1990.

As a result of its cost-driven financial situation, the School of Dental Medicine's faculty is about half the size of most dental schools, and the student-to-faculty ratio is one of the highest in the nation -- 6.2 students for every faculty member. The national average is less than five to one.

Dental School History

The School of Dental Medicine has a long history, beginning with its founding in 1866. It is the first dental school west of the Mississippi River and the fourth oldest in the nation. The School became part of Washington University in 1892. Living alumni now total more than 2,700 dentists.

In 1967 the University's trustees considered closing the dental school because of serious financial problems. Following administrative and financial reorganization, the School made a limited fiscal recovery, but then fell victim during the 1980s to the serious nationwide decline in both quantity and quality of prospective dental students. Other private universities recently announcing closure of their dental schools are Georgetown, Emory, and Farleigh Dickinson.

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WASHINGTON UNIVERSITY SCHOOL OF DENTAL MEDICINE

June 8, 1989

DRAFT

TO: Members of the Incoming Sophomore Class

FROM: Dr. Richard J. Smith
Dean Designate

During this time of sadness and concern at the School of Dental Medicine I recognize that the information that you have received regarding the phase-out of the school leaves you with a number of questions. I am writing to you now to help clarify your particular situation and to outline the alternatives that I see open to you.

I believe that the concerns expressed to you by Chancellor Danforth and Dean Bensinger in their letters of June 2 regarding the program that will be available for your Senior year in 1991-1992 are valid. There will be an unavoidable attrition of faculty and staff during the phase-out as these individuals proceed to other opportunities. It is, of course, the final year in which this problem will be greatest. We can also anticipate problems in keeping the patient community informed that a small group of students are continuing to treat patients (there is already a concern that some patients believe the clinic has closed), and there will be problems in accepting patients with treatment plans that cannot be completed before the school closes. Given the announcement of closure, many actual or prospective

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patients will choose other sites for treatment. Even if reasonable efforts succeed in maintaining a program approved by the American Dental Association Commission on Accreditation, you must recognize that the unavoidably small group of remaining students and faculty cannot provide you with the best possible diverse and interactive environment that is so important for a well rounded clinical training. Because none of us are acquainted with closure of a school, you must be aware that we can not, with certainty, anticipate now all the contingencies that may occur, including some that make it difficult, or impracticable, for us to offer a Senior year to you. While reasonable efforts will be made to provide a Senior year, you must be aware that we are not guaranteeing or promising that you will be able to complete three (3) more years of dental education at Washington University.

For those of you who require remediation of Freshman courses this summer, or who may need to repeat the year, there will be severe restrictions on the academic program available to you. There will be no opportunity to repeat the Freshman year if you fail remediation this summer, and there will be no opportunity to repeat the sophomore year should you fail any necessary remediation next summer. The school will close completely in May, 1992. There will be no options to meet clinical requirements after that date and we certainly will not certify for graduation anyone who has not completed requirements. Because of this situation, the Chancellor's letter notes that the 1991-92 year will be available only for students who complete the Junior year "in good standing". I interpret this to mean that you

must have passed all Junior year courses and the recommended number of clinical hours for the Junior year in order to begin the Senior year. Thus, if your own honest self-evaluation leads you to anticipate significant academic or other problems that may delay the completion of your degree requirements, or you foresee such problems at the end of the Sophomore, Junior or Senior year, it is imperative that you plan to transfer as soon as possible.

In summary, I offer the following observations and suggestions:

1. The expected and strongly recommended course of action is that you transfer. Some of you may want to do so at the end of the Sophomore year, others now.
2. If you can transfer now, I would strongly recommend that you do so. Enclosed is a release form that will allow Dr. Brand to submit copies of your records directly to the institutions that you request. Please proceed quickly.
3. Those of you who may find yourself in the position of needing to repeat the Freshman year should also apply for admission as a new Freshman to other schools immediately. Once again, contact Dr. Brand for advice.
4. Those of you who think you can meet the requirements outlined in this letter and wish to attempt to stay here for your degrees, de-

spite the risk inherent in such choice, must make an appointment to see me no later than the first week after the Sophomore year begins.

I hope that this information has been helpful to you. I sincerely hope you are able to work out this difficult transition smoothly and quickly.

MERCER UNIVERSITY/EMORY UNIVERSITY

AGREEMENT

THIS AGREEMENT, dated the 6th day of February, 1987 by and between EMORY UNIVERSITY (hereafter "Emory"), a Georgia non-profit corporation and MERCER UNIVERSITY (hereafter "Mercer") a Georgia non-profit corporation;

WITNESSETH THAT:

WHEREAS, Mercer has heretofore operated a School of Nursing (hereafter "Mercer Nursing School") and its discontinuing such operation; and

WHEREAS, Emory operates the Nell Hodgson Woodruff School of Nursing (hereafter "Emory Nursing School"); and

WHEREAS, the education of junior and senior students enrolled at the Mercer Nursing School will be interrupted by the discontinuance of said School and Mercer wishes to make provision for the continuance of their education at a high quality institution such as Emory; and

WHEREAS, Emory is willing to enroll such students who are in good standing at the Mercer Nursing School as expeditiously as practicable under the terms and conditions hereafter set forth;

NOW THEREFORE, in consideration of the mutual covenants herein and other good and valuable consideration, the parties agree as follows:

1. All junior and senior students in good standing enrolled in the Mercer Nursing School who so elect (hereafter "Students") will transfer as soon as practicable to the Emory Nursing School and Emory agrees to accept and enroll them as students in the Emory Nursing School without the necessity for a formal application process.

2. Mercer will, at or before the time of transfer, deliver to Emory true, accurate and certified copies of each Student's application, conduct and academic records and certification that each such Student is in good standing. It shall be Mercer's responsibility to obtain any necessary consents from each Student for such delivery.

3. (a) All Students will be subject to Emory Nursing School policies with regard to academic progression, retention and graduation; and

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(b) All Students will complete a pathophysiology course, N315 and a 5 credit "bridge" course; and

(c) All Students will complete required general education courses as required by Emory to complete the B.S.N. degree.

4. Each Student currently in his or her senior year will be required to complete satisfactorily during the Spring and Summer, 1987 a total of twenty-four (24) semester credit hours, including the courses prescribed in Paragraph 3(b) above, at the Emory Nursing School. It is understood between the parties, and Mercer shall advise each such Student, that this requirement will result in a delay in graduation for such Students beyond the time they normally would have graduated from the Mercer Nursing School and a delay in eligibility for such Students to take the licensing board examinations.

5. Each Student currently in his or her junior year will be required to complete satisfactorily a total of eleven (11) semester credit hours, including the courses prescribed in Paragraph 3(b), during the Spring and Summer 1987 at Emory and, in addition, the full senior year.

6. Scholarships and financial aid presently awarded by Mercer to the Students, or equivalent assistance, will be continued by direct payments from Mercer to Emory and Emory will credit each Student's account appropriately.

7. Subject to paragraph 6 above, the following rules govern financial obligations:

a. At the time of transfer, Mercer shall pay to Emory the entire amount due to Emory for tuition for the course work prescribed in Paragraphs 4 and 5 above at a rate of per semester credit hour, plus (%) thereof, and all prescribed student fees. Collection of any amounts which would have been due from such Students for Mercer academic terms coinciding with such time period shall be solely the responsibility of Mercer.

b. For required work at Emory during the 1987-88 academic year by current junior Students, Mercer shall pay to Emory, within ten (10) days after registration, the difference between Emory's tuition and fees, as then applicable, and Mercer's current tuition and fees. The balance shall be Emory's responsibility to collect from the Student's.

c. Emory may refuse or revoke registration of any Student whose account is not in a current status.

d. Any refunds of tuition and fees due from Emory by reason of withdrawal of a Student or otherwise shall be paid by Emory to the Student unless Mercer shall have delivered to Emory a signed agreement from the Student in which the Student consents to pay all or part of such refund to Mercer.

8. It shall be the responsibility of Mercer to convey accurately to the Students the terms of this Agreement.

9. This Agreement constitutes the entire agreement of the parties and all prior discussions and agreements are merged herein. This Agreement may be modified only by a writing signed by both parties.

10. This Agreement shall be governed by and construed in accordance with the laws of the State of Georgia.

WHEREFORE, the parties have executed this Agreement on the day and year first above written.

EMORY UNIVERSITY

By: _____

Title

MERCER UNIVERSITY

By: _____

Title

MERCER UNIVERSITY

AGREEMENT (Juniors)

THIS AGREEMENT dated the ____ day of _____,
1987 by and between _____ (the "Student") and
The Corporation of Mercer University ("Mercer")

WITNESSES:

WHEREAS, the Student is currently enrolled and in good standing as a junior student in Mercer's School of Nursing; and

WHEREAS, Mercer is discontinuing the operation of its School of Nursing and has entered into an agreement with Emory University dated February 6, 1987 ("Emory-Mercer Agreement") under which Emory has agreed to accept the Student in the Emory Nursing School and to provide specific courses which, if satisfactorily completed, will permit the student to complete the B.S.N. degree at Emory; and

WHEREAS, the Student wishes to transfer to Emory, under the terms and conditions of the Emory-Mercer Agreement; and

WHEREAS, the Emory-Mercer Agreement contemplates that Mercer will convey to the Student the terms of that agreement and will obtain from the Student certain consents; and

WHEREAS, Mercer wishes to provide for certain additional costs that the Student may incur as a consequence of the discontinuance of Mercer's School of Nursing; and

WHEREAS, the parties wish to set forth in writing their understandings and agreements in order to avoid and terminate any and all controversies or disputes arising out of the discontinuance of Mercer's School of Nursing;

NOW THEREFORE, in consideration of the premises and of the mutual covenants herein, the parties agree as follows:

1. The Student agrees to transfer to the Emory Nursing School, in accordance with the terms of the Emory-Mercer Agreement, a copy of which is attached hereto and incorporated herein. The Student acknowledges that she has read and had an opportunity to have answered any questions she may have concerning the Emory-Mercer Agreement. In particular, the Student acknowledges and understands that she will be subject to Emory Nursing School policies with regard to academic progression, retention and graduation; and that

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she will be required to complete satisfactorily during the Spring and Summer of 1987 a total of eleven (11) semester credit hours at the Emory Nursing School and, in addition, the full senior year.

2(a) In accordance with the Emory-Mercer Agreement, Mercer agrees to pay to Emory, on the Student's behalf, the full tuition and prescribed student fees for the eleven (11) semester credit hours to be taken by the Student during the Spring and Summer of 1987. The Student will not be required to pay to Mercer the tuition and fees that would have been due for Spring quarter 1987 at Mercer.

(b) For the Student's senior year at Emory during the 1987-88 academic year, Mercer agrees to pay to Emory, on the Student's behalf, the difference between Emory's tuition and fees, as then applicable, and Mercer's current tuition and fees. The student will be responsible to Emory for the balance of Emory's tuition and fees, i.e., an amount equivalent to Mercer's current tuition and fees for the senior year, or , less any financial assistance as provided in paragraph 3.

(c) Payment for any additional or repeated courses taken at Emory shall be the sole responsibility of the Student.

(d) If the Student withdraws or if for any other reason any refund of tuition or fees is due from Emory for the courses fully or partially paid for by Mercer, the Student agrees that all or a pro rata portion of such refund, as applicable, shall be paid by Emory to Mercer.

3. Mercer will pay directly to Emory the amount of any scholarships or Mercer-funded grants presently awarded to the Student by Mercer; any such payments will be credited to the Student's account at Emory. Upon Mercer's request and with Mercer's assistance, the Student agrees to complete applications through Emory's financial aid office for any governmental assistance and assistance under any loan programs presently held by the Student.

4. The Student hereby authorizes Mercer to deliver to Emory true, accurate and certified copies of the Student's application, conduct and academic records maintained by Mercer. Upon the Student's request, Mercer will permit the Student to inspect or to receive copies of the records

delivered to Emory (except those as to which the student has waived her right of access, if any), in accordance with Mercer's policies concerning student educational records.

5. Mercer agrees to pay to the Student the sum of _____ to cover the possibility of some additional incidental costs for items such as books, uniforms and parking at Emory.

6. In consideration of the benefits and payments made by Mercer to and on behalf of the Student under this Agreement and in order to avoid and terminate any controversies between the parties, the Student hereby releases Mercer and all its agents, officers and employees from any and all claims of any kind resulting from or in any way connected with the discontinuance of Mercer's School of Nursing.

7. This Agreement and Release shall bind and inure to the benefit of the parties hereto, their legal representatives, heirs, successors and assigns.

IN WITNESS WHEREOF, the parties have executed this Agreement and Release on the day and year first above written.

The Corporation of Mercer University

By: _____

R. Kirby Godsey, President

MERCER UNIVERSITY

AGREEMENT (Seniors)

THIS AGREEMENT, dated the ____ day of _____,
1987 by and between _____ (the "Student") and
The Corporation of Mercer University ("Mercer")

WITNESSES:

WHEREAS, the Student is currently enrolled and in good standing as a senior student in Mercer's School of Nursing; and

WHEREAS, Mercer is discontinuing the operation of its School of Nursing and has entered into an agreement with Emory University dated February 6, 1987 ("Emory-Mercer Agreement") under which Emory has agreed to accept the Student in the Emory Nursing School and to provide specific courses which, if satisfactorily completed, will permit the student to complete the B.S.N. degree at Emory in August, 1987; and

WHEREAS, the Student wishes to transfer to Emory, under the terms and conditions of the Emory-Mercer Agreement; and

WHEREAS, the Emory-Mercer Agreement contemplates that Mercer will convey to the Student the terms of that agreement and will obtain from the Student certain consents; and

WHEREAS, Mercer wishes to provide for certain additional costs that the Student may incur as a consequence of the discontinuance of Mercer's School of Nursing; and

WHEREAS, the parties wish to set forth in writing their understandings and agreements in order to avoid and terminate any and all controversies or disputes arising out of the discontinuance of Mercer's School of Nursing;

NOW THEREFORE, in consideration of the premises and of the mutual covenants herein, the parties agree as follows:

1. The Student agrees to transfer to the Emory Nursing School, in accordance with the terms of the Emory-Mercer Agreement, a copy of which is attached hereto and incorporated herein. The Student acknowledges that she has read and had an opportunity to have answered any questions

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she may have concerning the Emory-Mercer Agreement. In particular, the Student acknowledges and understands that she will be subject to Emory Nursing School policies with regard to academic progression, retention and graduation; that she will be required to complete satisfactorily during the Spring and Summer, 1987 a total of twenty-four (24) semester credit hours at the Emory Nursing School; and that this requirement will result in a delay in graduation beyond the time the Student would normally have graduated from Mercer's Nursing School and a delay in the Student's eligibility to take the licensing board exams. Mercer has been advised by Emory that the coursework required to complete the Student's B.S.N. degree at Emory will be as described in the schedule attached to and made a part of this Agreement, and that the expected completion date for the Student is August 7, 1987.

2(a) In accordance with the Emory-Mercer Agreement, Mercer agrees to pay to Emory, on the Student's behalf, the full tuition and prescribed student fees for the twenty-four (24) semester credit hours necessary for completion of the Student's B.S.N. degree.

(b) The Student will not be required to pay to Mercer any amounts which would have been due if the Student had been able to complete her degree at Mercer.

(c) Payment for any repeated courses or any additional courses (other than the coursework required to complete the B.S.N. degree at Emory) shall be the sole responsibility of the Student.

(d) If the Student withdraws or if for any other reason any refund of tuition or fees is due from Emory for the courses paid for by Mercer, the Student agrees that such refund shall be paid by Emory to Mercer; however, if the Student withdraws and subsequently re-enrolls at Emory within two years from the date of this Agreement, Mercer agrees to pay to Emory, on the Student's behalf, the amount of any refund paid to Mercer.

3. Upon Mercer's request and with Mercer's assistance, the Student agrees to complete applications through Emory's financial aid office for any governmental financial assistance presently held by the Student.

4. The Student hereby authorizes Mercer to deliver to Emory true, accurate and certified copies of the Student's application, conduct and academic records maintained by Mercer. Upon the Student's request, Mercer will permit the Student to inspect or to receive copies of the records delivered to Emory (except those as to which the student has waived her right of access, if any), in accordance with Mercer's policies concerning student educational records.

5. Mercer agrees to pay to the Student the sum of _____ to cover the possibility of some additional incidental costs for items such as books, uniforms and parking at Emory and to compensate for the delay in graduation and eligibility to take the licensing board exams.

6. In consideration of the benefits and payments made by Mercer to and on behalf of the Student under this Agreement and in order to avoid and terminate any controversies between the parties, the Student hereby releases Mercer and all its agents, officers and employees from any and all claims of any kind resulting from or in any way connected with the discontinuance of Mercer's School of Nursing.

7. This Agreement and Release shall bind and inure to the benefit of the parties hereto, their legal representatives, heirs, successors and assigns.

IN WITNESS WHEREOF, the parties have executed this Agreement and Release on the day and year first above written.

The Corporation of Mercer University

By: _____

R. Kirby Godsey, President

May 5, 1989

Dear Mercer Atlanta Student:

The purpose of this letter is to provide you with information about the status of the Atlanta operations of Mercer University. There are many reports being circulated about decisions that have been made, and it is our desire to provide clarity for you and your fellow students so you will have the information you need to make your future educational plans.

The Mercer University trustees, at their meeting of April 21, 1989, voted to discontinue the undergraduate programs of the College of Arts and Sciences and close the College effective June 30, 1990. The School of Business will continue to offer graduate programs on the campus and will also offer upper division (junior and senior level) courses leading to a BBA degree. In addition, the trustees set into motion a plan to move the School of Pharmacy to the Northeast campus as soon as such a move is feasible. The goal is for the Northeast campus of Mercer Atlanta to become a center for graduate and professional education for Mercer University.

For those students who experience hardship because of these decisions, we offer our sincere regret. Major change is difficult and we are aware that you deserve accurate information and special services during this transition period. To this end, we are in the process of making arrangements to help you complete your work at Mercer or facilitate your transfer to another institution with as little difficulty as possible.

To coordinate these services, we have set up a Transition Office which is located in the Administration Building, Room A-174 A,B (near the Registrar's Office); it will be open beginning Monday, May 8. This office will be the focal point for information for students, faculty, and staff. The hours for the office will be 9:00 a.m. until 6:00 p.m., Monday through Thursday, and 9:00 a.m. until 4:30 p.m. on Friday. The office will also be open at other times by appointment. The telephone number is 986-3144. Please make an appointment or stop by with your questions regarding the completion of your work at Mercer or the transfer of your work to another institution.

The Transition Office will have information sheets listing the services which are presently being provided, as well as transition policy decisions which have been made. This list will grow as the Transition Team learns which issues need to be addressed. To help us help you, please visit the Transition Office or call and tell us what you need so we can respond to those needs as soon as possible.

Sincerely,

Richard V. Swindle
Chair, Transition Team
Associate Provost for Administrative Affairs

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MERCER

Office of the Provost

MEMORANDUM

TO: Mercer University Atlanta Students

FROM: Richard V. Swindle
Chair, Transition Team

DATE: June 14, 1989

SUBJECT: Transition Information

Please read the following information carefully so you will know what decisions have been made regarding the operation of the Northeast Atlanta campus of Mercer, as well as the arrangements that have been made to assist College of Arts and Sciences students to complete their work at Mercer or transfer to other institutions.

1. Graduate business programs and upper division business courses will continue. The School of Business and Economics will continue to offer junior and senior level business courses, as well as graduate programs, beyond June, 1990. Further information and schedules of course offerings are available in the SBE Office.
2. Graduate education programs will continue. Graduate education programs will also continue to be offered on the Atlanta campus beyond June, 1990, through the College of Liberal Arts.
3. Upper division computer science courses. A faculty committee is considering the continuation of upper division computer science courses beyond June, 1990 through the School of Business and Economics. Further information will be provided as soon as possible.
4. Adjustments in graduation requirements. The faculty of CAS has approved several adjustments in graduation requirements to help upper division students complete their degrees at CAS. The residency requirement for graduation has been changed to require that 15 of the last 45 credit hours must be in residency at CAS, permitting up to 30 hours of transient credit earned at other institutions after June, 1990, to count toward a degree from CAS. Students may graduate and receive degrees from CAS through June 30, 1992.

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5. Interest-free loans. Mercer will make available interest-free loans, beginning this summer quarter, to assist junior and senior students in CAS to take increased course loads in order to complete their work at CAS. The loans are available to students whose college of record is CAS, who have attained junior or senior status (as defined in the catalog) at the end of Spring Quarter 1989, and who are in good financial standing with the University. A student may apply for loans to cover the cost of up to 10 hours per quarter above his or her average course load; requests for loans to cover more than 10 hours per quarter must be approved by the Associate Vice President for Finance. Repayment of the loans will be over a two-year period beginning 30 days after graduation. Applications and further information may be obtained from the Financial Aid Office. Students who are receiving or are eligible for federal or state financial aid should discuss their circumstances with a financial aid counselor.
6. Application fees for CAS students who must transfer to other institutions. Through an arrangement with the University Center of Georgia, CAS students who must transfer to complete their educational programs may apply to any member institution in the Center without paying the fee. (University Center members include: Agnes Scott College, Atlanta College of Art, Atlanta University Center [Morris Brown, Spelman, Clark or Morehouse], Emory University, Georgia Institute of Technology, Georgia State University, Kennesaw College, Oglethorpe University, Southern Technical Institute, and the University of Georgia.) Application fees will also not be required for any of Mercer's undergraduate colleges or schools. For further information, or if you are considering transferring to other institutions, please contact the Transition Office.
7. Mercer Macon. CAS students may transfer to the College of Liberal Arts in Macon at the Atlanta undergraduate tuition rate (which is significantly less than students normally pay to attend the College of Liberal Arts.) No application fees are required, and records will be transferred directly from Atlanta's Registrar's Office without the need to go through the normal application process. Students who have completed the general education requirements at CAS will be deemed to have completed the general education requirements of the College of Liberal Arts. In addition, preferential treatment will be given to students in the awarding of financial aid. For further information, please contact the Transition Office or Mr. Tommy Eiland in the Admissions Office in Macon (1-800-342-0841).

8. Oglethorpe University. An agreement has been reached with Oglethorpe to allow preferential treatment in the transfer of CAS students to Oglethorpe. No application fee is required, and the normal application process will be simplified (with the student's permission, Oglethorpe will make the admissions decisions based on records on file at CAS). Students transferring to Oglethorpe's full-time day program who have a 3.2 academic GPA or better will be eligible for special scholarships covering the tuition differential between CAS and Oglethorpe. Part-time students may be interested in Oglethorpe's evening program, which has more lenient admissions requirements and lower tuition than that of CAS. To receive more information, please contact the Transition Office or Mr. Randy Smith in the Admissions Office at Oglethorpe (233-6864).
9. Agnes Scott College. Through July 15, Agnes Scott will assure that any student accepted will receive financial aid to meet all of her demonstrated financial need. No application fee is required, and the application process is simplified, as with Oglethorpe. Special arrangements regarding admissions requirements are available for women who are 25 and older. For additional information, contact the Transition Office or Mr. Scott Snead in the Admissions Office at Agnes Scott (371-6285).
10. DeKalb College. Those students who need to pursue some remedial work before attending another four-year institution or who simply wish to attend a community college for a few quarters before transferring elsewhere may find that DeKalb College is well suited to their needs. Any student who has completed 20 quarter hours at Mercer may transfer to DeKalb without additional testing. (It is necessary to have an overall "C" average and a "C" grade in English 101 and 102). For additional information, contact the Transition Office or call Mr. Jerry Wright at DeKalb College (244-2395).
11. Kennesaw College. We have received a course equivalency table from Kennesaw College, listing the general education requirements at Mercer as compared with those at Kennesaw. If you would like a copy, you may pick one up at the Transition Office. Course equivalency tables for other institutions are also available or in preparation.

12. Residence requirements of other institutions. For those students who will not be able to complete their work at CAS, it is important to be aware of the residence requirements for graduation from other institutions in deciding when to transfer. For example, at Oglethorpe, the 60 semester hours of credit immediately preceding graduation must generally be completed at Oglethorpe. At Agnes Scott, the junior and senior years are to be completed at Agnes Scott. Rising juniors interested in transferring to institutions such as these which have two-year residence requirements for graduation should consider transferring this fall. Other institutions' graduation residence requirements (e.g. Georgia State's) may be met in one year. Each institution's catalog includes its graduation residence requirements, and a list of residence requirements for area institutions is available in the Transition Office.
13. Transition Office. The summer hours for the Transition Office will be 9:00 a.m. until 3:00 p.m. each weekday. We will be open at other times by appointment. If you would like to make an appointment or stop by, we are located in room A-174A,B of the Administration Building. The phone number is 986-3144. The office has application information as well as catalogs for most Atlanta area institutions.

We are continuing to work to make the transition for students as smooth as possible. We urge you to bring your special concerns to the Transition Office so that we may help you more effectively.

RVS:kv

MERCER

Special Assistant to the President
for Administrative Affairs - Atlanta

April 10, 1990

Dear Mercer Atlanta Student:

The purpose of this letter is to provide you with an updated list of the decisions which have been made by the Transition Team related to the closing of the College of Arts and Sciences. Most of these decisions have been communicated to you through previous mailings, but we thought that a concise list of the key decisions would be helpful to you. If you need additional information about these or any other transition decisions, please contact the Transition Office.

- * Those students intending to graduate from the Cecil B. Day College of Arts and Sciences have until June 30, 1992 to complete all requirements for graduation. At each graduation ceremony through June, 1992, students may march and be awarded CAS diplomas.
- * The residency requirement for graduation has been changed to require that only 15 of the last 45 credit hours must be in residency at CAS. A maximum of 30 hours of transient or cross registration credit earned at other institutions may be applied toward a degree from CAS. (Note: Some or all of those transient credits may be earned after June, 1990. All other graduation requirements continue to apply.)
- * For CAS students who need to transfer to another institution in order to complete an undergraduate degree, the Transition Office will provide information about other institutions as well as expedite the paperwork and pay the application fee.
- * CAS students may transfer to the College of Liberal Arts of Mercer University in Macon and pay the Atlanta undergraduate tuition rate. This is a significant reduction over the normal tuition rate. Also, special financial aid consideration will be given those CAS students who wish to transfer to Macon.

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- * Upper division (Junior and Senior) programs will continue in the School of Business, including computer science. Students who wish to change to a business major and remain at Mercer Atlanta should contact the Stetson School of Business at 986-3160.
- * Mercer has negotiated an agreement with Oglethorpe University to provide preferential treatment in the transfer of CAS students to Oglethorpe. Special scholarships are available for CAS students who are full-time at Oglethorpe and meet certain GPA requirements.
- * For CAS students who are not certain of their graduation status, the Registrar's Office will evaluate academic records at no charge.
- * Academic advising for CAS students will be handled by the Registrar's Office after June 30, 1990.
- * For students who have problems or questions that have not been addressed, please contact the Transition Office at 986-3144.

For detailed information about any of the decisions which have been made regarding the transition of CAS students, please call or visit the Transition Office. Our hours are 8:30 a.m. to 5:00 p.m. Monday through Thursday, and 8:30 a.m. to 4:30 p.m. on Fridays. We are open other times by appointment.

Sincerely,

Richard V. Swindle

Richard V. Swindle
Chair, Transition Team

RVS:jmm

MERCER UNIVERSITY

April 11, 1990

M E M O R A N D U M

TO: CAS Faculty Members
(As of April 21, 1989)

FROM: Thomas Black, Chairman
Executive Committee of the Board of Trustees

The last year has been hard for all of us. I know that many of you have had difficulty believing that we, the Trustees, bear no animosity toward you and are genuinely concerned about the disruptions in your lives resulting from the decision to close the College of Arts and Sciences. I would like to reemphasize that, as we have stated from the outset, we want to assist each of you in making the transition from CAS to other positions. While it appears that the original transition team has been quite successful in assisting students, its efforts have not been embraced by the faculty.

Unfortunately, the adversarial nature of the litigation magnified our differences and, for some people, it hardened convictions that the decision to close CAS was absolutely right or absolutely wrong. As a Trustee who participated in the decision and, subsequently, participated in the mediation process during the course of the trial, I know that, despite the jury's findings, we have acted in good faith. While I know that you may never agree with this decision, it is my hope that some day you will appreciate that the Trustees, faced with difficult circumstances, acted out of concern for the best interests of the University.

Another unfortunate aspect of the litigation has been that direct communication between us has been very difficult. Now that the trial phase of the litigation is over, we hope that you will join with us in addressing your individual needs so that you can get on with your lives. Some of you have already left Mercer for other positions. Others have accepted appointments for next year at other institutions, have arranged for other employment, or have

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retired. Recently, we have offered some of you positions at Mercer. We recognize, therefore, that some of you will not need any further assistance and, regrettably, some of you may not want further assistance from this University.

For those of you who do want and need assistance, we have asked Dean Charles Karcher, Mr. Robert McKinnon and Ms. Diane Brambila to work with individual faculty members and to recommend actions to be taken by the University. For example, this Committee will explore alternatives such as out-placement counseling, reasonable moving expenses, retraining assistance, continuation of benefits, early retirement, and similar types of assistance. The Committee will have the flexibility to call upon others as needed.

We encourage you to meet with the Committee to discuss your individual circumstances. The Committee will be on the Atlanta campus all day April 26 and 27 and will arrange for other meeting times as needed. If you are interested in taking advantage of this assistance, please contact Dean Karcher's office to schedule a meeting or submit a written request to any member of the Committee.

It is my sincere hope that communication, understanding and healing may be possible among us.

MEMORANDUM

TO: President R. Kirby Godsey

FROM: Special Committee
re CAS Faculty Members

RE: Recommendations re CAS Faculty Members

In response to the invitation in Mr. Black's memo, 32 CAS faculty members met individually with the special committee,* 4 others sent letters to the committee, and one additional faculty member met individually with Corinne Houpt. Each individual meeting was approximately 45 minutes in length and, with a very few exceptions, all three committee members and Corinne Houpt were involved in each meeting.

The needs expressed and the assistance requested varied widely. Fourteen of those we met with have accepted other positions, in some cases requiring relocation and in others at lower salaries or status. At least twenty have not yet found other positions; most are actively seeking work and expect to find it soon, although some are encountering problems. Overall, the committee was impressed with the faculty members' professional abilities and personal qualities and with their openness and honesty in discussing their individual circumstances.

The attached listing represents the committee's recommendations concerning transitional assistance. As you will note, the listing is by individual. In the interest of completeness, it includes all CAS faculty members as of April 21, 1989, including 27 for whom no further transitional assistance is recommended (because they have been offered positions at Mercer, have previously left or retired, etc.) and two that we are recommending be offered specific positions on a temporary basis, as per their requests.

* The special committee consists of Dean Charles Karcher, Robert McKinnon and Diane Brambila. Dean Karcher asked Corinne Houpt to be present in the individual meetings and to participate in the committee's deliberations.

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3001 Mercer University Drive
Davis Building, Suite A-230
Atlanta, Georgia 30341
(404) 986-3100

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For the remaining 29 individuals, our recommendations involve two components. The first attempts to address various transitional needs and concerns expressed by the individuals and includes some combination of payment of salary for

the summer, continuation of benefits, moving expenses, outplacement counseling and job search expenses, tuition waiver continuation, and access to certain space, equipment and secretarial assistance on campus. In direct dollar outlays, these amounts range from around \$ to nearly \$ per person, with an average of about \$ In arriving at this component, the committee did not make distinctions based on length of service or tenure status.

The second component of our recommendations provides an additional payment of 1% of salary for each year of service as a faculty member at Mercer, to be paid either in cash or as an additional retirement contribution. While this component is not directly tied to identified transitional needs, it is intended to provide additional assistance to those individuals who have served here the longest and who thus may be expected to encounter the greatest difficulties in making the transition. The amount of this component ranges from around \$ (for a non-tenured faculty member with two years of service) to almost \$ (for a 26-year tenured professor).

It should be noted that in many cases the committee's recommendations are less generous than the faculty members' expressed needs. For example, one faculty member asked for 12 years' salary and 20 years' retirement benefits; many more asked for one or two years' salary or salary continuation until they found another position. Several other faculty members who had received or accepted offers requiring relocation expressed concerns about higher housing and other costs of living and about anticipated losses in selling Atlanta houses. Eighteen faculty members expressed the view (some as their highest priority) that the University should pay their attorney's fees, which they indicated were \$ per person. The committee considered items in these categories to be beyond the scope of its responsibilities to make recommendations concerning transition assistance.

cc: Robert Steed
Thomas Black

ADDITIONAL RESOURCES

ADDITIONAL RESOURCES

BOOKS AND MONOGRAPHS

- Cyert, Richard M. "The Management of Universities of Constant or Decreasing Size." Current Issues in Higher Education -- Strategies for Retrenchment: National, State, Institutional, Vol. 2, No. 6. Washington, DC: American Association for Higher Education, 1980.
- Hample, Steven R., Ed. Coping with Faculty Reduction. New Directions for Institutional Research No. 30. San Francisco: Jossey-Bass, Inc., 1981.
- Hendrickson, Robert M., and Lee, Barbara A. Academic Employment and Retrenchment: Judicial Review and Administrative Action. ASHE-ERIC Higher Education Research Report, no. 8. Washington, DC: Association for the Study of Higher Education, 1983.
- Kemerer, Frank R. and Satryb, Ronald P, eds. Facing Financial Exigency: Strategies for Educational Administrators. Lexington, MA: Lexington Books, 1977.
- Kramer, Martin, Ed. Meeting Student Aid Needs in a Period of Retrenchment. New Directions for Higher Education, No. 40. San Francisco: Jossey-Bass, Inc., 1982.
- Melchiori, Gerlinda A. Planning for Program Discontinuance: From Default to Design. AAHE-ERIC Higher Education Report, no. 5. Washington, DC: American Association for Higher Education, 1982.
- Mingle, James R., and Associates. Challenges of Retrenchment: Strategies for Consolidating Programs, Cutting Costs, and Reallocating Resources. San Francisco: Jossey-Bass, Inc., 1981.
- Mortimer, Kenneth P., and Tierney, Michael L. The Three "R's" of the Eighties: Reduction, Reallocation, and Retrenchment. AAHE-ERIC Higher Education Research Report, no. 4. Washington, DC: American Association for Higher Education, 1979.
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- Paine, Cary A. The Impact of Financial Exigency and Program Discontinuance on Tenured Faculty members in Christian College Coalition Schools. [microform], 1989.

ARTICLES

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- Ludolph, Robert C. "Termination of Faculty Tenure Rights Due to Financial Exigency and Program Discontinuance." 63 University of Detroit Law Review 609-55 (Summer 1986).
- "No Retrenchment in Affirmative Action: The Tension Between Civil Rights Laws and Layoffs. Firefighters Local Union No. 1784 v. Stotts [104 S. Ct. 2576]." 50 Missouri Law Review 663-86 (Summer 1985).
- Parker, Johnny C., and Parker, Linda C. "Affirmative Action: Protecting the Untenured Minority Professor During Extreme Financial Exigency." 17 North Carolina Central Law Journal 119-34 (1988).
- Richards, Mary S. "'Financial Emergency' and the Faculty Furlough: A Breach of Contract?" 10 Journal of College and University Law 225-42 (Fall 1983-84).
- Saunders, Marybeth K. "Legal Issues in Terminating Tenured Faculty Members Because of Financial Exigency." 14 College Law Digest 272 (May 31, 1984) Reprinted from Educational Record (Winter 1984).

National Association of College
and University Attorneys
One Dupont Circle, N.W.
Suite 620
Washington, D.C. 20036
202-833-8390
FAX 202-296-8379

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